FILED

APR 30 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1172

GIUSEPPE BOZZO FU LORENZO, as owner of the STEAM VESSEL ANTOINETTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1173

A. T. ROSASCO, as owner of the STEAM VESSEL SANTA ROSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1174

MARIANO MARESCA AND COMPANY, as owner of the STEAM VESSEL MAR GLAUCO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. 1175

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the STEAM VESSEL BELVEDERE, her engines, boilers, and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA
and
LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

PETITION FOR WRITS OF CERTIORARI AND SUPPORTING BRIEF

HOMER L. LOOMIS,
Counsel for Petitioners,
60 Wall Street,
New York City, New York.

TABLE OF CONTENTS

PAGE

Petition for Writs of Certiorari 1–45

Preliminary Statement 2

A. Summary Statement of Matter Involved 2–16

B. Jurisdictional Statement 17

C. The Questions Presented 17–20

D. Specifications of Error 20–38

E. Reasons Relied on for the Allowance of the Writs 38–44

Brief in Support of Petition 47–126

A. Introductory Statements 48

1. Report of Opinions Below 48

2. Basis of Jurisdiction 48

3. Specifications of Error 48

B. Argument:

Summary of Argument 48–55

FIRST POINT—The decree affirmed below, in denying petitioner the right to continue his defense of title to the Vessel "Antoinetta" against libellant's asserted forfeiture title, striking his appearance and defense, and adjudicating without a trial that he stands without a property right in the *res*, violated his guaranties of due process, was beyond the Court's judicial power and is unsustainable for any purpose 55–66

a. The lower courts arbitrarily denied petitioner the right of defense guaranteed him by law 60–64

b. It was not open to Government to offer, nor to Court to hear, the former's assertion of title by capture for enemy ownership, at least until its assertion of title by forfeiture for crime was out of the way 64–65

PAGE

c. The lower courts arbitrarily and without right denied petitioner a trial of his defense against the Government's claim of title by capture.....65–66

SECOND POINT—The Government's claim of title by capture was unsustainable on the face of the record 66–102

a. The Trading with the Enemy Act was without application either to petitioner's property or to the public contract whereunder it was possessed and operated by the American sovereign 66–70

b. The Trading with the Enemy Act by necessary implication denied to Government a right to capture petitioner's property.....71–83

c. Even if the Trading with the Enemy Act did not by necessary implication withhold from the Government any and all power to capture petitioner's property, it should be so construed because such capture was not within the purpose of the legislation..... 83

d. Even if the Trading with the Enemy Act did not by necessary implication deny Government any and all power to capture petitioner's property, it should be so construed because to construe it otherwise would be to render it to that extent unconstitutional 84–90

e. Even if the Trading with the Enemy Act did not by necessary implication deny to Government any and all power to capture petitioner's property, it should be so construed because such construction is in keeping with the law of nations 90–99

f. Petitioner's property could in no event be captured until found, and found capturable as enemy property; and such finding was never made 100–102

PAGE

THIRD POINT—Even if petitioner was without any property interest in the "Antoinetta" after the alleged capture, he nevertheless did still possess a defensible interest in the outcome of the litigation, and to deny him, as did the lower courts, the right to continue to defend that interest against the libel was a denial of the due process guaranteed him by the law 103–108

a. Petitioner's ownership of the "Antoinetta" though past, entitled him to defend against the libel 104–106

b. Petitioner's interest in preserving the trusteeship of the Government for the benefit of his American creditors, entitled him to defend against the libel 106–108

FOURTH POINT—The loss of the District Court's jurisdiction, if any, over the forfeiture suit, that must inevitably follow the alleged captor's substitution as claimant in place of petitioner, is sufficient in itself to condemn that substitution 109–110

FIFTH POINT—The District Court never did acquire jurisdiction over the cause of forfeiture; and, if it did, lost the same on libellant's availing itself of the remedy of requisition under the Idle Foreign Vessels Act, and removing the *res* from the District Court's custody and control 111–126

a. The District Court never did acquire jurisdiction over the forfeiture cause 111–117

b. Even if the District Court did originally acquire jurisdiction over the forfeiture cause, it lost the same when libellant availed itself of the remedy of requisition and removed the "Antoinetta" from the Court's custody and control 117–126

CONCLUSION—The petition for writs of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decrees there entered reversed 126

Table of Cases

PAGE

Acme Operating Corp. v. *United States,* 74 Ct. Cl. 82, rev'd in 288 U. S. 243 120
Andover and Medford Turnpike Corp. v. *Gould,* 6 Mass. 40 118
Annandale, The, [C. A.] 2 P. D. 218, aff'g 2 P. D. 179 ..... 24, 64
Antoinetta, The, 153 F. 2d 138 48
Antoinetta, The, 49 F. Supp. 148 48
Appollon, The, 9 Wheat. 362 ..... 30, 39, 52, 104

Banco Mexicano v. *Deutsche Bank,* 263 U. S. 591 ..... 53, 109
Banks, The v. *The Mayor,* 7 Wall. 16 98
Beaconsfield, The, 158 U. S. 303 ..... 53, 106
Becker Co. v. *Cummings,* 296 U. S. 74 ..... 40, 53, 109
Bennett v. *Railroad Company,* 102 U. S. 577 71
Blodgett v. *Holden,* 275 U. S. 142 90
Brig Ann, The, 9 Cranch 289 ..... 40, 120
Brown v. *United States,* 8 Cranch 110 ..... 40, 66, 111

Campbellsville Lumber Co. v. *Hubbert,* 112 Fed. 718, aff'd 191 U. S. 70 118
Charming Betsy, The, 2 Cranch 64 ..... 91, 97
Chipman v. *City of Hartford,* 21 Conn. 488 107
Chisholm v. *Georgia,* 2 Dall. 419 85
Cleveland v. *Chamberlain,* 66 U. S. 419 ..... 39, 53, 109
Colonna, Ex parte, 314 U. S. 510 58
Cooper v. *Reynolds,* 10 Wall. 308 120
Coppell v. *Hall,* 7 Wall. 542 ..... 67, 69
Cummings v. *Deutsche Bank,* 300 U. S. 115 ..... 40, 53, 61, 109

Daimler Co. v. *Continental Tyre Etc. Co.,* [H. L.] (1916) 2 A. C. 307 83
De Harov v. *United States,* 5 Wall. 599 71
Drake v. *Goodridge,* 6 Blatchf. 151, 7 Fed. Cas. 1050, Case No. 4,062 109

Ella Warley, The, Blatchf. Pr. Cas. 204, 8 Fed. Cas. 504, Case No. 4,370 117
Elliott Steam Tug Co. v. *Admiralty Commissioners,* [H. L.] (1921) 1 A. C. 137 74

---

* *Brady* v. *Roosevelt S.S. Co.,* 317 U. S. 575 122

PAGE

Federal Trade Comm'n v. *American Tobacco Co.*, 264 U. S. 298 90
Federal Trade Comm'n v. *Raladam Co.*, 283 U. S. 643 ..... 39, 66
Flanigan v. *Turner*, 66 U. S. 491 ..... 39, 50, 64
French v. *Edwards*, 13 Wall. 506 118
Gelston v. *Hoyt*, 3 Wheat. 246 ..... 24, 30, 39, 52, 64, 104, 105
Gibbons v. *Ogden*, 9 Wheat. 1 71
Giugni v. *United States*, 127 F. 2d 786 111
Globe & Rutgers Fire Ins. Co. v. *Hines*, 273 Fed. 774 ..... 53, 109
Hampton, The, 5 Wall. 372 ..... 39, 50, 63, 64
Hanger v. *Abbott*, 6 Wall. 532 ..... 67, 68
Henderson's Distilled Spirits, 14 Wall. 44 ..... 24, 64
Hill v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52 17
Hilton v. *Guyot*, 159 U. S. 113 91
Hirabayashi v. *United States*, 320 U. S. 81 ..... 39, 65
Hirshfeld v. *Bopp*, 5 App. Div. [N. Y.] 202 110
Hoop, The, 1 C. Rob. 196 69
Hopkins v. *Grimshaw*, 165 U. S. 342 ..... 50, 64
Hunter v. *Central Union Trust Co.*, 17 F. 2d 174 ..... 26, 52, 100, 101
Jennings v. *Carson*, 4 Cranch 2 ..... 40, 119, 120
Johnson v. *Fleet Corp.*, 280 U. S. 320 123
Kaiser Wilhelm II, The, 246 Fed. 786 ..... 53, 106
Kumezo Kawato, Ex parte, 317 U. S. 69 ..... 60, 61
Labor Board v. *Jones & Laughlin*, 301 U. S. 1 90
Leme, The, Unreported 42
Little Charles, The, 1 Brock. 347, 26 Fed. Cas. 979, Case No. 15,612 121
Lord v. *Veazie*, 8 How. 251 ..... 39, 53, 109
Lynch v. *United States*, 292 U. S. 571 85
McCulloch v. *Maryland*, 4 Wheat. 316 85
McKee v. *Gratz*, 260 U. S. 127 71
McVeigh v. *United States*, 11 Wall. 259 ..... 39, 40, 48, 55, 58, 59, 60

PAGE

Machen v. *United States*, 87 F. 2d 594 87
Marchese v. *United States*, 126 F. 2d 671 ..... 34, 40, 43, 111, 112, 114
Markham v. *Cabell* [U. S. Sup. Ct.], Adv. Op. No. 76, Dec. 14, 1945 ..... 30, 39, 53, 106
Memphis, The, Blatchf. Pr. Cas. 202, 16 Fed. Cas. 1340, Case No. 9,412 117
Miller v. *Robertson*, 266 U. S. 243 83
Miller v. *United States*, 11 Wall. 268 ..... 67, 83, 120
Missouri Pacific R. R. Co. v. *Boone*, 270 U. S. 466 90
Mongioia, The, Unreported 42
Monk v. *Jenkins*, 2 Hill's Equity (S. C.) 9 118
Motor Vessel K-22,845, The, 55 F. 2d 671 125

N. Y. Central R. Co. v. *The Talisman*, 288 U. S. 239 71
Norfolk Southern R. R. Co. v. *Chatman*, 244 U. S. 276 ..... 50, 64
North German Lloyd v. *United States*, 61 Ct. Cl. 138, cert. den. 270 U. S. 645 88

Panama R. R. Co. v. *Johnson*, 264 U. S. 375 90
Paquete Habana, The, 175 U. S. 677 91
Pease v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273 ..... 50, 64
Pendleton v. *Benner Line*, 246 U. S. 353 ..... 53, 106
Penhallow v. *Doane's Adm'rs.*, 3 Dall. 54 85
Perry v. *United States*, 294 U. S. 330 ..... 39, 51, 52, 85, 86, 87, 99
Peterhoff, The, Blatchf. Pr. Cas. 463, 19 Fed. Cas. 316, Case No. 11,024 117
Phelps v. *Oaks*, 117 U. S. 236 109
Phelps v. *United States*, 274 U. S. 341 72
Pietro Campanella, The, 47 F. Supp. 374 43
Polonio v. *United States*, 131 F. 2d 679 111
Porter v. *Freudenberg* [C. A.], [1915], 1 K. B. 857 58

Queenan v. *Mays*, 90 F. 2d 525 ..... 53, 107

Railroad Companies v. *Schutte*, 103 U. S. 118 106
Railway Co. v. *McCarthy*, 96 U. S. 258 ..... 50, 64
Rapid, The, 8 Cranch 155 ..... 67, 69

PAGE

Regina del Mare, The, Br. & L. 315 76
Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331 90
Rio Grande, The, 23 Wall. 458 ..... 40, 120, 121
Robb v. *Vos*, 155 U. S. 13 ..... 39, 50, 65
Russian Volunteer Fleet v. *United States*, 282 U. S. 481 72

Sally, The, 8 Cranch 382 ..... 39, 50, 62, 64
Samuel, The, 1 Wheat. 9 ..... 111, 116
San Leonardo, The, 51 F. Supp. 107 ..... 43, 120, 121
Scaleggeri v. *United States*, 126 F. 2d 1023 ..... 34, 111, 112
Scholefield v. *Eichelberger*, 7 Pet. 586 ..... 67, 68
Scholey v. *Rew*, 23 Wall. 331 ..... 39, 50, 64
Simon v. *Miller*, 298 Fed. 520 78
Sinking Fund Cases, 99 U. S. 700 85
Stephen Hart, The, Blatchf. Pr. Cas. 387, 22 Fed. Cas. 1253, Case No. 13,364 117
Stevenson & Sons v. *Aktiengesellschaft, etc.*, [H.L.], (1918) A. C. 239 83
Stoehr v. *Wallace*, 255 U. S. 239 ..... 26, 39, 52, 67, 100, 101
Stuart v. *Hayden*, 169 U. S. 1 ..... 50, 65
Sutherland v. *Mayer*, 271 U. S. 272 83

Thorshaven and its Dependencies, Edwards 102 77
Travelers Assn. v. *Prinsen*, 291 U. S. 576 71

Union Pacific Co. v. *Mason City Co.*, 199 U. S. 160 106
United States v. *422 Casks of Wine*, 1 Pet. 547 ..... 39, 52, 105
United States v. *Charles D. Kaier Co.*, 61 F. 2d 160 111
United States v. *Chemical Foundation*, 272 U. S. 1 ..... 61, 83
United States v. *Cooper Corp.*, 312 U. S. 600 67
United States v. *Dakota-Montana Oil Co.*, 288 U. S. 459 77
United States v. *G. Falk & Brother*, 204 U. S. 143 77
United States v. *Hudson*, 7 Cranch 32 ..... 40, 111
United States v. *Mack*, 295 U. S. 480 120
United States v. *Oregon Lumber Co.*, 260 U. S. 290 ..... 50, 65
United States v. *The Pietro Campanella*, 44 F. Supp. 348 ..... 34, 112
United States v. *Pink*, 315 U. S. 203 72

PAGE

United States v. *Securities Corporation General*, 4 F. 2d 619, aff'd in *White* v. *Mechanics Securities Corp.*, 269 U. S. 283 67
United States v. *Stowell*, 133 U. S. 1 ..... 24, 64
United States v. *Title Ins. Co.*, 265 U. S. 472 106

Van Winkle v. *Crowell*, 146 U. S. 42 ..... 39, 50, 65
Villarperosa, The, 43 F. Supp. 140 ..... 120, 121

Ward v. *Brandt*, IX Mart. (La.) O. S. 625 ..... 107, 108
Watts, Watts & Co. v. *Unione Austriaca, etc.*, 248 U. S. 9 ..... 39, 49, 58
White v. *Mechanics Securities Corp.*, 269 U. S. 283, aff'g 4 F. 2d 619 ..... 30, 39, 53, 67, 106
Whitney Steamboat Co., Ex parte, 249 U. S. 115 ..... 120, 121
William Bagaley, The, 5 Wall. 377 ..... 67, 68
Windsor v. *McVeigh*, 93 U. S. 274 ..... 39, 40, 49, 56, 58, 60
Wood-Paper Co. v. *Heft*, 8 Wall. 333 ..... 53, 109

Yick Wo v. *Hopkins*, 118 U. S. 356 85

Zamora, The [1916], 2 A. C. 77 117

Table of Laws

Constitutional:
Constitution, U. S.:
Art. 1, sec. 8, cl. 11 66
Fifth Amendment 20, 22, 48, 51, 60, 62, 63, 64, 72, 98
Fourteenth Amendment, sec. 4 ..... 51, 52, 85, 86, 99

Congressional:
Joint Resolutions:
Abrogating Gold Clause in Contracts, June 5, 1933, (48 Stat. 113; 31 U. S. C. A., sec. 463) 85, 87
Authorizing Confiscation of Enemy Vessels in World War No. 1, May 12, 1917, c. 13, (40 stat. 75) 80
Extending Idle Foreign Vessels Act six months beyond war, June 16, 1942, c. 416, 56 Stat. 370 ..... 27, 76

PAGE

Statutes:
Customs Revenue Act of June 17, 1930, c. 497, Title IV:
Sec. 605 (46 Stat. 754; 19 U. S. C. A., sec. 1605) 36, 119
Sec. 613 (46 Stat. 756; 19 U. S. C. A., sec. 1613) 36, 37
Sec. 614 (46 Stat. 757; 19 U. S. C. A., sec. 1614) 37
Sec. 616 (46 Stat. 757; 19 U. S. C. A., sec. 1616) 32–33, 54, 110
Sec. 617 (46 Stat. 757; 19 U. S. C. A., sec. 1617) 32–33, 54, 110
Sec. 618 (46 Stat. 757; 19 U. S. C. A., sec. 1618) 32–33, 54, 110

Espionage Act, The, June 15, 1917, Title II:
Sec. 1 (40 Stat. 220; 50 U. S. C. A., sec. 191) 3, 114, 115
Sec. 2 (40 Stat. 220; 50 U. S. C. A., sec. 192) 3, 114
Sec. 3 (40 Stat. 220; 50 U. S. C. A., sec. 193) 4, 32, 33, 34, 41, 54, 110, 111, 112, 115, 116
Sec. 4 (40 Stat. 220; 50 U. S. C. A., sec. 194) 4, 112, 113

Idle Foreign Vessels Act, June 6, 1941, (55 Stat. 242; 50 U. S. C. A., App., sec. 1271) 6, 8, 12, 18, 20, 26, 27, 34, 35, 36, 41, 51, 66, 72, 74, 76, 82, 83, 111, 117, 118, 121, 122, 123, 124, 125
As extended six months beyond end of war by Joint Resolution, June 16, 1942, c. 416, 56 Stat. 370 ..... 27, 76
As amended by Act of March 24, 1943, c. 26, 57 Stat. 49:
Sec. 3 (c) 27, 121, 122
Sec. 5 77

PAGE

Judicial Code, sec. 240, (Act of March 27, 1911, c. 23, sec. 240, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, sec. 1; 43 Stat. 938; 28 U. S. C. A., sec. 347) 17

Merchant Marine Act, 1936, sec. 902, (49 Stat. 2015; 46 U. S. C. A., sec. 1242) 6, 7, 8, 72, 73, 74, 123, 124
As amended by the Act of March 24, 1943, c. 26, sec. 3 (d), 57 Stat. 49 .....37–38, 124, 125

North German Lloyd Docks Purchase Act, March 28, 1918, (40 Stat. 459) 88

Revised Statutes, 970 (28 U. S. C. A., sec. 818)....29–30, 104
As derived from the Act of April 25, 1810, c. 64, sec. 1 105

Trading with the Enemy Act, October 6, 1917, c. 106, (40 Stat. 411; 50 U. S. C. A. App.).....10, 18, 19, 25, 26, 27, 28, 40, 41, 51, 66, 67, 70, 71, 72, 77, 80, 83, 84, 85, 90, 97
Sec. 2 .....10, 74–75
Sec. 2(c) 10, 75
Sec. 3 10
Sec. 3(a) 10
Sec. 5(a) 10, 67
Sec. 5(b) as amended by the First War Powers Act, Dec. 18, 1941, c. 593 (55 Stat. 838; 50 U. S. C. A., App.).....11, 100
Sec. 7(b) 10, 58, 60, 62, 63, 64
Sec. 7(c) 10, 26, 69, 71, 100
Sec. 9(a) 11, 30, 53, 106

Tucker Act, March 3, 1887, c. 359, (24 Stat. 505, as amended; 28 U. S. C. A., secs. 41 (20), 250)....7, 123, 124

Executive:
Orders:
President's:
No. 2352 (4 F. R. 3851) 113, 114
No. 2412 (5 F. R. 2419) 113, 114, 115

PAGE

No. 8771 (6 F. R. 2759) 12–13, 75, 82
Sec. 1 12
Sec. 2 13
Sec. 3 .....13, 76, 82
No. 9054 (7 F. R. 837) 75, 76, 77
Sec. 1 75
Sec. 2 75
Sec. 3 .....75, 76
No. 9095 (7 F. R. 1971) as amended by.....
No. 9193 (7 F. R. 5205) .....
Sec. 2 11
Sec. 2 (e) 11
Sec. 6 11
Sec. 10 (a) 12, 26, 100
Alien Property Custodian's Vesting No. 52, (7 F. R. 5738) 12, 13, 14, 16, 23, 24, 25

Judicial:
Federal Rules of Civil Procedure:
19(b) 110

Table of Commentaries

Ayala, Balthazar, Three Books on the Law of War, etc., (John Pauley Bate, tr., 1912), Vol. 2, Ch. V, secs. 41, 42, 43, pp. 52, 53; Ch. VI, sec. 1, p. 55..... 97

Birkenhead, International Law, (6th ed.), p. 196 95
Bynkershoek, Quaestionum Juris Publici Libri Duo....70, 94

Calvo, M. Charles, Le Droit International, (3rd ed.), Vol. III, Part II, Book VI, sec. 1978, p. 242 .....93, 97
Congressional Record, U. S., Vol. 55, pp. 1903-1904..... 81

Fiore, Nouveau Droit International Public, (1886), III, 226, sec. 1392 .....93, 97

Grotius, War and Peace 94

Hackworth, Digest of International Law, Vol. VII, pp. 529, 541 82
Hall, International Law, (8th ed., 1924), sec. 144, pp. 521, 525 97

PAGE

Halleck, International Law, (1878 ed.), Vol. 2, Ch. 21, sec. 8, pp. 102-103 97
Hamilton's Works (Lodge ed. 1885):
Vol. 3, p. 29 86
Vol. 5, p. 73 (Letters of Camillus, No. 19) 84
Vol. 5, p. 91 (Letters of Camillus, No. 20) 97
Hyde, International Law, (1922), Vol. 2, sec. 623, p. 241 94

Kent's Commentaries, Vol. 1, p. 18 91–92

Moore, Professor John Bassett, Digest of International Law, Vol. 7, pp. 306, 307-308 ..... 92–94, 96

Opinions of Attorneys-General, Vol. 35, p. 15 32

Phillimore, International Law, (2nd ed.), III, pp. 34, 148 ..... 92, 97
Pradier-Fodéré, Traité de Droit International Public, (1894), VI, p. 740 ..... 93, 97

Scott, Collection of Cases on International Law, (1906), sec. 132, p. li 95
S. Repts. Nos. 111, 113, 65th Cong., 1st Sess. 51, 58, 67
Story's Equity Pleading, (10th ed.), pp. 160-161, 163 105
Sutherland:
Statutory Construction, (3rd ed., 1943, Horack), Vol. 2, pp. 216-217, sec. 2803 118

Taylor, International Public Law, p. 442 95
Twiss, Law of Nations, Part 2, "In Time of War", sec. 58, p. 112 ..... 93, 96

Vattel, Law of Nations, Book 3, Ch. 5, sec. 77 ..... 93, 96
Von Martens' "Precis du droit des Gens" (William Cobbett translation, June, 1802), Book VIII, Ch. II, sec. 5 ..... 96, 99

Westlake, International Law, (2nd ed., 1913), Vol. 2, Part 2, "War", Ch. 2, pp. 41-42 94
Wildman, Institutes of International Law, Vol. 2, pp. 10, 11 94
Woolsey, International Law, (6th ed.), p. 198 96

IN THE

Supreme Court of the United States

OCTOBER TEPM, 1945

No. .....

GIUSEPPE BOZZO FU LORENZO, as owner of the STEAM VESSEL ANTOINETTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

A. T. ROSASCO, as owner of the STEAM VESSEL SANTA ROSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

MARIANO MARESCA AND COMPANY, as owner of the STEAM VESSEL MAR GLAUCO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the STEAM VESSEL BELVEDERE, her engines, boilers, and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

PETITION FOR WRITS OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of Giuseppe Bozzo fu Lorenzo, A. T. Rosasco, Marino Maresca and Company, and "Italia"-Societa Anonima di Navigazione, respectfully alleges and propounds as follows:

Preliminary Statement

Since the facts in all of the causes above entitled are in all substantial respects identical and since all four causes were briefed and heard together in each court below—the United States District Court for the Eastern District of Pennsylvania and the United States Circuit Court of Appeals for the Third Circuit—on a statement of the facts involved in the first above-entitled cause and were in each court covered by one opinion, the petitioners herein, for the purpose of brevity, confine the following petition to a discussion of the facts, rulings below, questions, specifications of error and reasons for review as the same are to be found in the cause first above-entitled; but respectfully request that such discussion be deemed to apply to, and set forth, with the like force and effect, the facts, rulings below, questions, specifications of error and reasons for review involved in each of the three other causes.

A

Summary Statement of Matter Involved.

1

Your petitioner, Giuseppe Bozzo fu Lorenzo, claimant in the first above-entitled cause, is a citizen of the Kingdom of Italy and a resident of the City of Genoa therein,

and on and before March 30, 1941, was the sole owner of the Italian Steamship "Antoinetta", and still is the sole owner thereof save in so far as such ownership has been lost by reason of the events described hereinbelow.

2

On March 30, 1941 (R. 19a),* the libellant by its Secretary of the Treasury, purporting to act by authority of Title II, art. 1, of the Act of June 15, 1917 (40 Stat. 220; 50 U. S. C. A., c. 12, sec. 191)† seized the "Antoinetta" and took her into its protective custody.

---

* This and similar notations refer to pages of the printed transcript of record filed herein.

† Title II, sections 1-4, of the Act, as set out in 50 U. S. C. A., c. 12, secs. 191-4, reads as follows:

"TITLE 50.
"WAR

* * * * *

"CHAPTER 12.—VESSELS IN TERRITORIAL WATERS OF UNITED STATES

* * * * *

"Section 191. Secretary of Treasury and Governor of Canal Zone authorized to regulate anchorage, movement, and so forth, of vessels. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

"Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

* * * * *

"§192. Seizure and forfeiture of vessels for failure to observe regulations. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this chapter, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited

3

On July 14, 1941, the United States filed a libel *in rem* against the said steamer "Antoinetta" in the United States District Court for the eastern District of Pennsylvania to the end of having her declared forfeit to the United States under the provisions of Title II, sec. 3, of the Act of Congress of June 15, 1917 (*infra*, n.), on the ground that on said March 30, 1941, and prior to the libellant's said original seizure of the vessel for protective custody, "the owners, agent, master, officer, person in charge, or members of the crew * * * within the territorial waters of the United States, with the knowledge of the owner, master, or other person in charge, or command of the vessel, wilfully did cause or permit the injury and destruction of such vessel, her engines, boilers and machinery, tackle, apparel, furniture and equipment and

---

for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be punished by imprisonment for not more than ten years, and may, in the discretion of the court, be fined not more than $10,000.

* * * * *

"§193. Destruction of, injury to, or improper use of vessels. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessels shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be punished by imprisonment for not more than ten years and shall, in the discretion of the court, be fined not more than $10,000."

* * * * *

"§194. Employment of Army and Navy to enforce provisions of chapter. The president may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this chapter."

* * * * *

did knowingly permit said vessel to be used as a place of resort for person or persons conspiring with another or preparing to commit offenses against the United States * * * and of the rights and obligations of the United States under the law of nations, and in fraud of the United States" (R. 4a-5a).

The libel further alleged that the said vessel, within the territorial waters of the Port of Chester, on July 11, 1941, while still in libellant's protective custody, as aforesaid, had been a second time seized by libellant (that is, by its Collector of Customs of the Port of Philadelphia) for condemnation and forfeiture for the said alleged crime, and had since remained in the Collector's possession or custody (R. 5a); named said claimant, Giuseppe Bozzo fu Lorenzo, as the man in whose name the vessel was registered and duly documented under the laws of the Government of Italy; prayed the issuance of process *in rem* against the said vessel and a monition to all parties in interest to appear upon the return day and show cause why condemnation and forfeiture should not be decreed for the reason aforesaid; and further prayed the entry of a decree condemning the said vessel "as forfeited to the United States" (R. 6a).

4

The *in rem* process was issued accordingly (R. 7a); a copy of the same was posted upon the said vessel on July 16, 1941 (R. 8a); and on the same day a copy of said process was delivered in the Berks County Jail at Reading, Pennsylvania, to Giovanni Lena, as her master (R. 10a).

5

On July 31, 1941, the said Giovanni Lena on behalf of your petitioner filed a claim to the said steamer

"Antoinetta", in which he alleged that your said petitioner is her true and bona fide owner and himself her true and lawful bailee on behalf of her owner, and prayed to be admitted to defend accordingly (R. 11a-12a). And in the same behalf on September 11, 1941, exceptions to the libel were filed on the grounds, among others, that the allegations of the libel were insufficient (R. 14a, 15a, 16a); charged no act that would subject the vessel to seizure and forfeiture (R. 15a, 16a) and, instead, showed her seizure to have been unfounded, void, illegal and in violation of the owner's rights, because in violation of the Fifth Amendment of the Federal Constitution and because based upon claimed violations of law, as alleged in the libel, that were wholly insufficient (R. 14a, 15a, 16a); and failed to state a cause within the District Court's Admiralty and Maritime jurisdiction (R. 17a).

6

On October 8, 1941, with the action still pending as aforesaid, libellant filed a petition in the District Court, alleging that the President, through the Maritime Commission, and, on September 29, 1941, by authority of the Act of Congress of June 6, 1941 (55 Stat. 242; 50 U. S. C. A., App. sec. 1271),* had requisitioned for national

* The pertinent part of this Act of Congress of June 6, 1941, follows: "* * * during the existence of the national emergency declared by the President on September 8, 1939, * * * the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency, charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, * * * and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended:"†

† Section 902 of the Merchant Marine Act, 1936 (49 Stat. 2015, as amended; 46 U. S. C. A., sec. 1242), authorizing the President to requisition,

purposes, as provided in said act, the use of the said vessel as "a foreign merchant vessel then lying idle in waters of the United States" and praying the entry of an

---

during an emergency, vessel-tonnage owned or under construction in the United States, further provided in sub-section (a):

> "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, * * *. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition."

Sub-section (c) of the said sec. 902 (46 U. S. C. A., sec. 1242), providing that the requisition of a steamer's use, not title, should take the form of a charter as soon as the exigencies of the situation might permit, declared:

> "If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

And sub-section (d) of the said sec. 902 (46 U. S. C. A., sec. 1242) further provided:

> "In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by sections 41 (2) and 250 of Title 28" (The Tucker Act, March 3, 1887, c. 359, 24 Stat. 505, as amended).*

---

* "41 (2)" in this line should read "41 (20)".

order directing the Marshal of the Court and the Collector of Customs to comply with the Maritime Commission's Notice of Taking attached to and made a part of libellant's said petition, but without prejudice to libellant's rights in the forfeiture suit or under the said Act of June 6, 1941, the Court retaining its custody and jurisdiction of the vessel in said suit (R. 19a-20a).

The Notice of Taking, so attached and made a part of the said petition, was dated September 26, 1941; was addressed to "the Owner or Owners of the Vessel (and all persons claiming an interest therein)"; and set forth that the Maritime Commission, pursuant to the said Act of June 6, 1941, "has taken over the possession and use of the above named Vessel, including all tackle, apparel, furniture, spare parts, gear and equipment, and all stores and supplies, including fuel, aboard the Vessel, effective on September 29, 1941, at 12 o'clock, noon, Eastern Standard Time, under and subject to the Terms and Conditions of the Taking, Use and Disposition of the Vessel, a copy of which will be promptly furnished."

The said Notice of Taking also purported that such taking was without prejudice to the rights of the libellant "under any executive seizure of, or forfeiture proceedings against, said vessel, heretofore or hereafter effected or instituted"; and promised finally that

> "Compensation for such taking will be determined and made in accordance with the provisions of the aforesaid Act" (said Act of Congress of June 6, 1941) (R. 23a).

7

On December 12, 1941, the District Court entered an order directing its Marshal and the Collector of Customs to comply with the said Notice of Taking, subject to the proviso that the said order and all action taken pursuant thereto should be "without prejudice to the continued custody" of the District Court over the said vessel "or to the rights of any of the parties libelant or to any of the parties respondent, or to any other interested parties, in the pending proceeding, or under said Act of June 6, 1941, the Court at all times retaining the custody and jurisdiction of said vessel in each of said proceedings" (R. 21a).*

The order further permitted the Marshal to make a Special Deputy Marshal out of the Master or other person having custody of the vessel, and directed that in such custody he deliver it to the Maritime Commission for the purposes of said requisition, but that said Special Deputy Marshal or his substitute should always remain in possession of the vessel, and that the same should be returned to the custody of the Marshal on being released from requisition by the Maritime Commission (R. 21a).

8

On July 29, 1942, the libellant, acting through the Alien Property Custodian, filed a second petition (R. 24a), alleging *inter alia* that the claimant of said vessel, your said petitioner, was an enemy without a license (R. 25a),

* The similar orders directing delivery to the Maritime Commission, of the vessels involved in the three other above-entitled cases respectively, were entered in the District Court on the dates following: Santa Rosa, August 21, 1941, (Record in No. , p. 17); Mar Glauco, December 1, 1941 (Record in No. , p. 22); Belvedere, November 3, 1941, (Record in No. , p. 17).

and that the Custodian, purporting to act under the alleged authority of the Trading with the Enemy Act of October 6, 1917, c. 106 (40 Stat. 411; 50 U.S.C.A., App.)* as

---

*The pertinent sections of the Trading with the Enemy Act and the Executive Order referred to, both as amended, read as below set forth.

The Act:

"§2. Definitions. * * *

* * * * *

"The word 'person', as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

* * * * *

"The words 'to trade,' as used herein, shall be deemed to mean—

* * * * *

"(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

* * * * *

"§3. Acts prohibited. It shall be unlawful—

"(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

* * * * *

"§5. * * *. (a) * * * the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall describe, to any person or class of persons * * * to perform any act made unlawful without such license in section three hereof * * *; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; * * * and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

* * * * *

§7. * * *

"(b) * * *

* * * * *

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however,* That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

* * * * *

"(c) If the President shall so require any money or other property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of,

amended, and Executive Order No. 9095 of March 11, 1942 (7 F. R. 1971),† as amended, had, on July 22, 1942, found that the claimant was an alien enemy without a

---

or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, * * * may be seized by the Alien Property Custodian; * * *.

* * * * *

"The sole relief and remedy of any person having any claim to any money or other property * * * seized by him shall be that provided by the terms of this Act, * * *

* * * * *

"§9. * * * (a) Any person not an enemy or ally of enemy claiming any interest, right, or title, in any * * * property * * * seized by him" (the Alien Property Custodian) "hereunder and held by him * * * or to whom any debt may be owing from an enemy * * * whose property or any part thereof shall have been * * * delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of * * * property so held by the Alien Property Custodian * * * or of the interest therein to which the President shall determine said claimant is entitled * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, * * * or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

The first sentence of section 5(b) of the Trading with the Enemy Act, as amended by the First War Powers Act, December 18, 1941, c. 593, Title III, sec. 301 (55 Stat. 839; 50 U. S. C. A., App., sec. 616), reads as follows:

"(1) During the time of war or during any other period of national emergency declared by the President, * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, * * *."

† Executive Order No. 9095 (7 F. R. 1971) as amended by Executive Order No. 9193 (7 F. R. 5205):

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including * * * the power to * * * vest, with respect to * * *

"(e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; * * *.

"6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian * * * all powers and authority conferred upon me by section 5(b) of the Trading with the Enemy Act as amended,

license and, by Vesting Order No. 52, had demanded, seized, and vested in himself "all right, title and interest, if any," of said claimant in the said vessel, including engines, boilers, tackle, apparel, furniture, spare parts and equipment, and all stores and fuel whether aboard the vessel or appertaining thereto and "the proceeds" of the vessel, and "any claim against the United States for compensation for anything heretofore or hereafter done under the Act of June 6, 1941," (*supra*, 6 n.), in respect to the vessel (R. 28a-29a); but alleging further that nothing in the vesting order should be construed as impairing any authority that the Maritime Commission or War Shipping Administration might have in respect to the vessel under the said Act of June 6, 1941, or Executive Order No. 8771 (6 F. R. 2759)* or any amendment thereof,

---

including * * * the power to make such investigations * * * as he deems necessary or appropriate to determine whether any * * * property should be subject to his jurisdiction and control under this Executive Order. * * *

"10. * * * *(a). * * * For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended."

* This Executive Order, dated June 6, 1941, reads as follows:

"Whereas Section 1 of the Act of Congress entitled 'An Act to authorize the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes,' approved June 6, 1941, provides, in part:

* * * during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense * * *.

"And whereas I find that the foreign merchant vessels now lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, are necessary to the national defense:

"Now, Therefore, by virtue of the authority vested in me by the aforesaid act, it is hereby ordered as follows:

1. The United States Maritime Commission (hereinafter called the 'Commission') is hereby authorized and empowered, at such time

or to continue, modify or revoke any arrangements theretofore made by them in respect to the vessel (R. 30a); alleging further that

> "Nothing in this order" (Vesting Order No. 52) "shall be construed as recognizing that Claimants, or any of them, have any right, title or interest in said vessels. This order and all action taken pursuant thereto is in strict subordination to the rights of the United States including rights of forfeiture and salvage rights. It is the intention of this order to effect a complete substitution of the Alien Property Custodian for Claimants, and each of them, in respect of any right, title or interest they, or any of them, may have in any or all of said vessels" (R. 30a);

---

or times and upon such terms and conditions as the Commission shall deem desirable and conducive to the national defense, to purchase, requisition, charter, requisition the use of, or take over the title to, or the possession of, any or all foreign merchant vessels which are lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, including all tackle, apparel, furniture, spare parts and equipment, and all stores, including fuel, aboard such vessels or appertaining thereto, for the use and disposition hereinafter directed.

2. Without limiting the authority of the Commission under the provisions of sections 3, 4 and 5 of said Act of Congress or under any other provision of law, the Commission is authorized and directed, to such extent and upon such terms and conditions as the Commission shall deem desirable and conducive to the national defense:

(a) To operate any or all of such vessels, either directly or by agent, in any service of the United States, or in any commerce, foreign or coastwise.

(b) To charter or lease any or all of such vessels to any persons for operation in any service of the United States, or in any commerce, foreign or coastwise: *Provided*, that no vessel shall be transferred, chartered, or leased to any belligerent government without the approval of the President.

(c) To document any or all of such vessels under the laws of the United States or any neutral country of the Western Hemisphere.

(d) To make such other use or disposition of any or all of such vessels as the President may hereafter direct.

(e) To repair, equip, and man such vessels and to do whatever may be necessary to accomplish the purposes of the said act or this order.

3. The Commission is directed to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act.

and alleging further that by reason of the premises there had been "effected a complete substitution of petitioner for the Claimant in respect of such right, title or interest, if any, as the Claimant may have had in said vessel, and petitioner is entitled to be substituted as a party herein in the place and stead of the Claimant" (R. 26a).

And the prayer of the petition was (1) that the Custodian be substituted as party in place of said claimant; (2) that all claims, pleadings, motions or exceptions filed by said claimant be as to him dismissed, denied and overruled, without prejudice to the Custodian,—that said claimant

> "be adjudged without any right, title or interest in said vessel and that such right, title and interest, if any, as the Claimant may have had therein prior to said Vesting Order be adjudged vested in petitioner",—

and that all claims, pleadings, motions or exceptions filed by said claimant be ordered to stand of record for the Custodian's benefit, pending his having an opportunity to amend, supplement or "withdraw" the same as he might be advised; and (3) that leave be granted the Custodian so to amend, supplement or "withdraw" the said claims, pleadings, motions or exceptions, or to file such others as he might be advised (R. 26a).

9

On September 19, 1942, said claimant filed his answer to said petition last above named, denying the said allegation that said claimant had no license (R. 42a) and denying knowledge or information as to said allegation of what the Custodian had found or done, but alleging that, if true, it was immaterial and irrelevant to the

Custodian's demands (R. 42a), denying that the effect of what the Custodian was alleged to have found or done had been to work a substitution of Custodian for said claimant in respect to the latter's right, title, or interest, in respect to said vessel, or to entitle Custodian to be substituted as party in place of said claimant (R. 43a), and praying that said petition be denied in all respects (R. 43a).

10

On the same day, September 19, 1942, said claimant filed notice of his motion, on the proceedings previously had and papers previously filed, for an order dismissing libellant's said petition and libel, and naming September 28, 1942, as the return date (R. 44a-45a); at which time (R. 2a) said motion as well as petition came on for hearing before the Honorable Harry E. Kalodner, United States District Judge.

11

On March 8, 1943, the said District Judge filed his opinion (R. 46a) holding that libellant's said petition should in all respects be granted and claimant's said motion in all respects denied (R. 57a). His reasons were in substance that claimant's right to defend his property against attack in court lasted only as long as he had not already lost his title to the *res;* that here he had already lost his title to the *res* either by forfeiture for crime or by capture for enemy ownership; and that, therefore, he had no further right of defense and it was libellant's prerogative to control both sides of the litigation and enter such decree as it might be advised.

12

On May 19, 1943, a decree was filed (R. 58a) pursuant to said opinion, granting the prayer of the petition "in all respects", substituting the Custodian as a party in place of claimant, dismissing, denying and overruling as to claimant all his claims, pleadings, motions and exceptions, but letting them stand for the benefit of the Custodian, to whom leave was granted to replace, amend, supplement or "withdraw" the same as he might be advised. And it was

> "Further Ordered, that said Claimant is hereby adjudged without any right, title or interest in the steam vessel 'Antoinetta', and that such right, title and interest, if any, as the claimant may have had therein prior to the Vesting Order referred to in the petition is hereby adjudged to be vested in the petitioner • • •" (R. 59a).

13

Pursuant to leave granted on August 18, 1943 (R. 60a), claimant appealed from said decree and said rulings to the Circuit Court of Appeals for the Third Circuit, where, on March 30, 1945, the appeal was heard on written and oral argument, resulting in an opinion of affirmance filed on December 13, 1945, and based upon reasoning in substance the same as that announced by the District Court (R.). And on December 21, 1945, a decree was filed affirming the decree appealed from (R.). A petition for reargument, filed within the prescribed time, was denied in an order filed on February 13, 1946 (R.).

B

Jurisdictional Statement.

1

The statutory provision sustaining the jurisdiction here invoked is section 240 of the Judicial Code as amended (Act of March 3, 1911, c. 23, sec. 240, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938; 28 U. S. C. A., sec. 347).*

2

The date of the decree sought to be reviewed—final for your petitioner (*Hill* v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52)—is December 21, 1945 (R.), as to which a timely petition for reargument was denied by an order filed February 13, 1946 (R.); the date upon which this application for certiorari is presented is April 30, 1946.

C

The Questions Presented

1

Whether an alien enemy whose property has been assailed in court by the Federal Government and who has been cited to, and does, appear and undertake to defend the *res*, may by judicial decree be deprived thereof, unheard and without a trial.

---

* Section 240 of the Judicial Code, as amended and pertinent, reads as follows:

"In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2

Whether in such action the Federal Government can be heard to urge, at one and the same time, that it first acquired full title to the alien enemy's property in the *res* by forfeiture for crime and thereafter full title thereto by capture for enemy ownership, and that, by reason of such later capture, the alien enemy is barred from disputing such earlier forfeiture; and whether, having chosen to maintain its remedy of forfeiture, it is not barred, at least while still in pursuit of that remedy, from pursuing also the remedy of capture, and urging it in aid of the former remedy.

3

Whether the owner's property in a vessel whose use and possession, under the Idle Foreign Vessels Act, has been requisitioned, availed of and operated as chartered, by the Federal Government while the vessel's owner is still an alien friend, becomes, while still so possessed and operated, subject to capture under the Trading with the Enemy Act on that Government's going to war with his own.

4

Whether an alien enemy against whom and whose property relief is demanded in court by the Federal Government on the ground of having a captor's title thereto, may there question such title, and there defend against such demand, on the grounds (1) that the Trading with the Enemy Act is without application, and, even if it be not, (2) that under the laws of this country said property at all pertinent times has been and is immune to capture, (3) that at all said times its capture has been and is beyond the statutory and constitutional powers of its alleged captor, and (4) that the latter failed to perform the essential conditions precedent to the exercise of

such statutory and constitutional powers of capture as it did possess; and, if such defense be permissible, whether its validity, the face of the record does not here make manifest, as showing said property (a) to have been without the purview of the Trading with the Enemy Act, and even if not, (b) to have been property to whose safe keeping for, and return, delivery and payment to the alien enemy, the public faith was plighted, (c) to have consisted solely in and of a contractual obligation and debt of the sovereign United States and (d) never to have been found, or found to be capturable as enemy property.

5

Whether such alien enemy, even though his property in the *res* had vanished following the Federal Government's said alleged capture, was not still possessed of a defensible interest entitling him to continue his defense against the same Government's assertion of title by forfeiture, in view of his continuing interest, by means of such defense, to preserve (1) his right to damages for a tortious seizure of his said property as forfeited and (2) the trusteeship of the alleged captor of his said property for the benefit of his American creditors.

6

Whether such alien enemy's defense against the assertion of title by forfeiture could in any event be assumed by such alleged captor itself, in view of the resulting identity of interest between pursuer and defender, entailing loss at least of the District Court's jurisdiction over the controversy as to said alien enemy's property, and either loss of such jurisdiction as to all others' property, or, in case of the latter's forfeiture, an unlawful remission of the penalty incurred by the former.

7

Whether, even prior to the striking of such alien enemy's appearance and defense against such libel, the court had acquired jurisdiction thereover, in view of the libel's failure to allege a covering statute of operative force and effect as of the time of the alleged offense or to allege an offense made ground of forfeiture by that or other statute; and, if so, whether the court retained jurisdiction over the cause following libellant's adoption of the remedy provided by the Idle Foreign Vessels Act, its requisition of said property as that of the alien enemy and its removal of the *res* from the possession, custody and control of the court.

D

Specifications of Error

Error is assigned to the decree and rulings of the Circuit Court of Appeals as follows:

1. In that they deprived your said petitioner of his property without due process of law and in violation of the guaranties of the Constitution (Fifth Am'd't.)* and laws of the country.

Said the Circuit Court of Appeals (R.):

> "By this seizure the Custodian became invested with whatever right claimant had. It is, therefore, right and proper that the Custodian be substituted in the libel proceeding for the claimant since the latter has been irrevocably divested of all his interests."

And the decree it affirmed, after ordering "that all claims, pleadings, motions and exceptions heretofore filed

* "No person shall be * * * deprived of * * * property, without due process of law; * * *"

on behalf of said claimant are hereby dismissed, denied and overruled as to said claimant," added that "it is

> "Further Ordered, that said Claimant is hereby adjudged without any right, title or interest in the steam vessel 'Antoinetta' ". * * * (R. 59a).

Petitioner contends that an alien enemy, though generally without a right to seek affirmative relief in our courts, is entitled, when he or his property is there assailed, there to defend the same and, in that connection, to make use of all the appliances and instrumentalities of defense; and that a decree depriving him of his property without such a trial is worthless for any purpose, save to defeat the court's jurisdiction *ab initio.*

2. In that that they denied him the right to defend his property in court when the same was therein assailed by the Government, and, without a trial, determined his asserted property rights to be nonexistent.

The Government,—while litigating in the District Court, as libellant, its claim of title to the steam vessel "Antoinetta", including claimant's property therein, as forfeited to it for crime on March 30, 1941, and while said claimant, pursuant to citation, was there defending it as his property,—filed in the same Court, by its Alien Property Custodian, a second claim of title to claimant's interest in the *res* as enemy property captured by libellant on July 22, 1942; one year, that is, after it had commenced its suit to establish its title thereto as forfeited for crime. And, on the ground that claimant's title had thus, *either* by forfeiture, *or* by capture, been absolutely acquired by libellant not later than July 22, 1942, libellant demanded without a trial and the court entered without a trial a decree dismissing from the cause said claimant, his appearance, and, as to him,

his pleadings, substituting as claimant in his place the libellant itself, in the person of its Custodian, and adjudicating that claimant was without any right, title or interest in the *res*.

The theory upon which libellant demanded and the court ruled that claimant must be denied all rights of defense was that libellant's claim of capture was an actual, present, absolute claim,—not conditioned, as claimant urged, upon defeat of libellant's claim of forfeiture, —that its validity was not open to question by either court or claimant, and that, because of it, claimant was without a standing even to question the validity of libellant's claim of forfeiture.

Claimant's position was and is that, though an alien enemy, he had under the Constitution and laws of this country, a right to defend at the appropriate time, against both claims of the libellant—asserted, as they were, in court against his property.

3. In that they upheld the District Court, while trying the Government's claim of title to claimant's said property by forfeiture for crime, in entertaining in court a new and contradictory claim of title by the Government, viz., that it had, in the midst of such litigation, captured claimant's title to said property for enemy ownership and thereby captured his right of defense in court against either claim.

Libellant's alleged capture, for enemy ownership, of claimant's property in the said vessel and just compensation for its value and use, was, if at all, effected on July 22, 1942, (R. 25a, 30a). But libellant was then, and for a year theretofore (R. 4a) had been, litigating in the District Court its claim that it already owned all such property through forfeiture for crime.

It is claimant's position that the District Court, at least while that litigation continued, was precluded from entertaining the new and contradictory claim of capture for enemy ownership and from recognizing or giving effect to any assertion of right predicated thereon.

4. In that they upheld the District Court in permitting libellant to pursue, in respect to the same *res*, the inconsistent remedies of forfeiture and capture, and did not bar pursuit of the latter remedy; at least while pursuit of the former was still on.

The two remedies of forfeiture and capture are wholly inconsistent: One being based upon title's being in the Government; the other, on its being in an enemy. Having elected the former, the libellant—petitioner urged and urges—is, at least while still pursuing the former, denied the latter.

5. In that, after entertaining such new claim of title by capture, they determined it to be an actual, present, and effective claim, not conditional on defeat of the Government's claim of title by forfeiture, nor, in advance of that event, moot and unavailable to the Government as ground for the assertion of any right in the litigation.

The courts below held libellant's assertion of title to claimant's property by capture to be absolute and independent of its claim of title thereto by forfeiture, the Circuit Court saying (R.):

> "The rights of the Custodian, although asserted by him without prejudice to the rights of the libellant are *not subordinate to* them. * * * The Custodian's rights are *unrelated* to the forfeiture proceedings." (Emphasis supplied.)

But the vesting order itself—made a part of the petition filed by libellant through its Custodian—stipulated other-

wise. It made the rights by capture *strictly subordinate* to the rights by forfeiture. It read (R. 30a):

> "*Nothing* in this order shall be construed as *recognizing* that Claimants, or any of them, *have* any right, title or interest in said vessel. This order and all action taken pursuant thereto is *in strict subordination* to the rights of the United States including *rights of forfeiture* and salvage rights. It is the intention of this order to effect a complete substitution of the Alien Property Custodian for Claimants, and each of them, in respect of any right, title or interest they, or any of them, *may have* in any or all of said vessels." (Emphasis supplied.)

Since the asserted forfeiture title, when and if ultimately validated by decree, would relate back to, and have been in the Government, at all times since March 30, 1941, the date of the alleged offense creating such title, (*Gelston* v. *Hoyt,* 3 Wheat. 246, 311; *Henderson's Distilled Spirits,* 14 Wall. 44, 57; *United States* v. *Stowell,* 133 U. S. 1, 16; *The Annandale,* [C. A.] 2 P. D. 218, 220, affg. 2 P. D. 179, 185), there, of course, in that event, would have been no property capturable or captured by the libellant for enemy ownership on July 22, 1942. And the vesting order, recognizing that fact, as noted above, was conditioned accordingly. Libellant's brief in the Court of Appeals conceded that the capture was thus conditional upon the outcome of the forfeiture suit and could in no event become effective save in the event libellant failed to make good its forfeiture title. It read (p. 15 of libellant's Circuit Court brief in the case of the "Aussa," No. 8754 in that Court, and No. here):

> "The Alien Property Custodian by his Vesting Order • • • acquired • • • *only* such right,

> title, and interest, *if any,* as *would* be held by the Italian owners-claimants, *in the event* the United States' *claim to forfeiture is adjudged invalid.*" (Emphasis supplied.)

But the Court of Appeals, treating the claim of capture as unconditional and absolute, ruled, as to the vesting order, as follows (R.):

> "This order unconditionally * * * divested claimants of all right, title and interest in the vessels and vested these in the Alien Property Custodian."

It is claimant's position that the Circuit Court erred in treating the Custodian otherwise than as a stranger to the litigation, at least until the Government's alleged title by forfeiture had been proved nonexistent; that at such time his claim of title might conceivably present a present, justiciable controversy, but not before.

6. In that they determined libellant's new assertion in court of title by capture to be not open to inquiry by court or defense by claimant, and refused to hear, consider, or try claimant's defense, viz.: That such asserted capture had never been effected for want of property found, or found to be capturable as enemy property; and, if so, was beyond the putative captor's statutory and constitutional powers because said property was immune to capture, as being property to which the Trading with the Enemy Act was without application, as being property devoted to the service of, and under contract with, the sovereign United States, to whose safe-keeping for, and restoration, delivery and payment to claimant, the public faith was plighted, and as being property that consisted solely in and of a contractual obligation and debt, of the

sovereign United States, whose capture would mean nothing less nor other than its repudiation.

If libellant's claim of capture for enemy ownership was properly to be treated as a present, subsisting claim, affecting the course of the pending controversy as to the validity of libellant's asserted title by forfeiture for crime, as the courts below held, then, claimant contends, it was his right to defend against such claim of title by capture, for the reason underlying assignment No. 1, *supra*, viz., that it was an assault in court against his property; and that such defense, if allowed, must prevail for three reasons, viz.: (a) That petitioner's property was not subject to the provisions of the Trading with the Enemy Act because covered by a contract with the sovereign of the United States, whereas that Act applied only to property involved in trade between private American citizens or residents and the enemy; (b) that no capture had in any event been effected, since, under the Trading with the Enemy Act (sec. 7(c), *supra*, 10 n.) and sec. 10 of Executive Order No. 9095, as amended, (*supra*, 12 n.), even if they were applicable here, a *sine qua non* of the exercise by the Custodian of his power of capture is a *previous finding* by *him* of the *existence* of an enemy interest to be captured, and he could not substitute for that prerequisite the *possibility* (discussed under Assignment 5, *supra*,) of a *court's* making such finding at some time in the future (*Stoehr* v. *Wallace*, 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.*, [D. C. S. D. N. Y.], 17 F. 2d 174, 175, 178): And (c) that, even had such a preliminary *finding* been made by the *Custodian himself*, the capture of claimant's property in the "Antoinetta" was entirely beyond the Custodian's statutory and constitutional powers because, by virtue of the Idle Foreign Vessels Act and what was done thereunder, the public faith was plighted to the preservation for, and return,

delivery and payment to petitioner, of said property or its value, with hire for its use; because its immunity to capture was implicitly required by the Trading with the Enemy Act; and because—petitioner's property thus consisting solely in and of the sovereign contractual obligation and debt of the United States—its capture would amount to a repudiation of a national obligation and debt of the sovereign itself, which the law both statutory and constitutional forbade.

Petitioner's property in the vessel "Antoinetta" had been, by virtue of statutory authority, in peace-time made the subject of a requisition demise or bare-boat charter, to be thereafter executed between the Government and claimant, and performed by the Government; had been thereunder taken over and into the possession, custody and control of the Government; and, following the outbreak of war, did pursuant to said statutory authority, remain in the possession of the Government, and did continue to be operated by the Government under, and in performance of, that requisition charter (Act of June 6, 1941, *supra*, 6 n.; Joint Resolution of June 16, 1942, c. 416, 56 Stat. 370*; Act of March 24, 1943, c. 26, sec. 3(c), 57 Stat. 49 †).

---

* Joint Resolution of June 16, 1942, as pertinent, read:

"To extend certain Emergency laws relating to the Merchant Marine, and for other purposes.

"* * * the provisions of each of the following Acts and resolutions, and all authority thereunder are hereby continued in full force and effect until six months after the termination of the present war shall have been proclaimed * * *: * * * Public Law 101, Seventy-seventh Congress, approved June 6, 1941" (*supra*, —). "; * * * and all authority of the Commission transferred to the Administrator of the War Shipping Administration by the President's Executive Order of February 7, 1942 (numbered 9054; 7 Federal Register, 837)† shall be performed by such Administrator in conformity with such Executive Order.

† Sec. 3(c) of the Act of March 24, 1943, read as follows:

The Act of March 24, 1943, c. 26, sec. 3(c), 57 Stat. 49, amending the Act of June 6, 1941, as amended, read as here pertinent as follows:

"(c) In the event that a vessel the title or use and possession of which is requisitioned or taken pursuant to Section 902 of the

The requisition of the vessel (in peace-time) had been accompanied with the most solemn assurances that petitioner's property therein would be respected and restored in kind or value at the end of the requisition service, together with hire for its use in the meantime.

Petitioner's sole property in the "Antoinetta", following its said taking under said requisition charter, consisted thus in and of his contractual right to recover from the United States, and its correlative contractual obligation or debt to restore or pay to him, at the end of the requisition charter, under the terms of the Act of June 6, 1941 (*supra*, 6 n.), his vessel in the same good order and condition it was in when taken, ordinary wear and tear excepted, (or in lieu thereof just compensation), and a just charter-hire for its use in the meantime. To capture claimant's property in the vessel, therefore, would be nothing other than to repudiate the sovereign's obligation to restore it and pay just compensation as aforesaid. But Congress never had purported to delegate such a power to the Executive; Congress on the contrary in the Trading with the Enemy Act (*supra*), even if here applicable, had denied it; and the general language of that Act would not warrant a contrary construction in view of the fact that, so construed, it would not only violate the Constitution, but also run counter to long and universally established principles of the law of nations. In

---

Merchant Marine Act, 1936, as amended, or the Act of June 6, 1941 (Public Law 101, Seventy-seventh Congress), is in the custody of any Court, State or Federal, it shall be the duty of all agents and officers of the court having possession, custody, or control of said vessel, forthwith upon the filing with the clerk of said court of a certified copy of the order of requisitioning or taking, and without further order of the court, to comply with said requisitioning or taking and to permit the representatives of the United States Maritime Commission or the War Shipping Administration, as the case may be, to take possession, custody, and control of said vessel."

war, private obligations or debts to enemy aliens may be sequestered or confiscated; not public.

7. In that they failed to hold and decree that even if claimant, by reason of libellant's claim of title by capture, had lost all right, title and interest in the "Antoinetta," he, nevertheless, still had a defensible interest in the litigation, entitling him to defend against the libel.

Below, libellant argued and the courts held that, after the alleged capture, not only was claimant without any property in the "Antoinetta", but that he had not even any defensible interest in the outcome of the litigation that would permit him further to defend against the libel. Said the District Court (R. 49a):

> "since a claimant's right to defend the original libel for forfeiture can only rest upon his claim to the libeled property, the substitution of the Custodian for the claimant is an inevitable sequalae.";

and the Court of Appeals (R.):

> "It is * * * right and proper that the Custodian be substituted in the libel proceeding for the claimant since the latter has been irrevocably divested of all his interests."

But it was, and is, claimant's position that defense to a libel *in rem* is not necessarily restricted to one retaining title until trial: That, (1), title at time of seizure, particularly in a forfeiture suit, is a valid basis of defense, since in such a suit the prime question at issue is whether such seizure was lawful or tortious; if tortious, it is the owner as of the time of seizure who was injured and who is entitled, on defeat of the libel and non-issuance of a certificate of want of reasonable cause (R.S. 970;

28 U.S.C.A., sec. 818),* to sue, and recover damages from, the tort-feazor (*Gelston* v. *Hoyt,* 3 Wheat. 246, 314; *The Appollon,* 9 Wheat. 362, 367); and claimant here, it is not denied, was owner at the time of the "Antoinetta's" seizure and, it is not denied, still retains the interest of having the seizure pronounced unlawful to the end of recovering from the Collector, in another action, the damages he thereby sustained.

That, also, (2), avoidance of prospective loss or liability resulting from the success of such a forfeiture suit gives one, bearing a present or past contractual relationship to the *res,* an equally good right of defense, such as that of a bailee. That petitioner here is in such a position; for, if the forfeiture suit should succeed, not only would he lose his right to recover damages for a tortious seizure, as noted *supra,* but he also would lose the benefit of the continuing trusteeship of the alleged captor of his said property to meet the demands of his American creditors. If he should succeed in defeating the suit, such property would constitute such a trust, and, even though in captor hands, impose upon the captor the duty of satisfying *pro tanto* those demands (Trading with the Enemy Act, sec. 9a, *supra,* 11 n.; *White* v. *Mechanics Securities Corp.,* 269 U. A. 283, 301; *Markham* v. *Cabell,* [U. S. Sup. Ct.], Adv. Op. No. 76, December 14, 1945); and from their burden, to the extent they were so satisfied, petitioner would be forever free. But, should

---

* This statute reads:

"When, in any prosecution commenced on account of the seizure of any vessel * * * made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided,* That the vessel * * * be, after judgment, forthwith returned to such claimant or his agent."

the suit succeed, his American creditors would have no alternative but to proceed against him and his European assets, which alone would then be answerable for their satisfaction.

8. In that they failed to determine and decree that libellant, acting through the Custodian, could in no event be permitted to assume the defense against libellant's own suit to forfeit claimant's property, because of the identity of interest that, in respect to libellant's controversy with the Italian owner, would then obtain between attacker and defender.

It was and is claimant's position that the only result that could ensue from a substitution of libellant, as Custodian, for claimant, would be a loss of jurisdiction in the Court further to entertain the cause of forfeiture, at least as to the Italian owner's interest in the vessel; and that this necessary consequence of such a step is sufficient to condemn it. The Circuit Court of Appeals, however, considered such objection not valid, since, it held, a judicial controversy as to forfeiture would remain between libellant and third parties, if any, having liens against the vessel. It said (R.):

> "Although the interests of the Custodian are not antagonistic to the United States as libellant, there is a justiciable case or controversy since third party interests * * * are determined by the decree."

In so ruling, the Court was but following libellant's contention, which, as there urged (p. 18 of libellant's Circuit Court brief in *The Aussa,* No. 8754 in that Court, and No. here), was that:

> "Even if there be an identity of interest status between the United States as libellant and the Alien

> Property Custodian as claimant, the United States is still entitled to final decrees of forfeiture against all other persons having or claiming any interests in the vessel, known or unknown, and whether now before the Court or not."

This, claimant denied below and denies here; contending that the forfeiture provided for by the statute relied on in the libel (Act of June 15, 1917, *supra*, 4 n.) is not of any individual interests in the offending vessel, but of the vessel herself,—and, to be availed of under that statute, must be of all interests or none. That it would in any event be a strange and anomalous proceeding in which the Government should enforce a forfeiture only against presumably innocent mortgage, maritime, attachment and stipulation lien-holders and permit the only interest charged as an offender, the owning interest, to escape the penalty. That, under the statute, if any interests in the vessel are forfeited, all are,—and, too, as of the date of the alleged offense, March 30, 1941: That, if the Government, while enforcing a forfeiture against third persons, exonerated the owner therefrom, it could only be by way of remission of a penalty already incurred; but that such remission could be lawfully granted, if at all, only by the Secretary of the Treasury after a finding by him of the owner's innocence of the very charge leveled against him in the libel (Act of June 17, 1930, c. 497, Title IV, secs. 616, 617, 618; 46 Stat 757; 19 U. S. C. A., secs. 1616, 1617, 1618:* 35 Op. Atty.-Gen.

---

* These sections read as follows:

"Sec. 1616. It shall not be lawful for any officer of the United States to compromise or abate any claim of the United States arising under the customs laws for any fine, penalty, or forfeiture, and any such officer who compromises or abates any such claim or attempts to make such compromise or abatement, or in any manner relieves or attempts to relieve any * * * vessel, * * * from any such fine, penalty, or forfeiture shall be guilty of a felony and upon conviction thereof shall be punished by a fine of not more than $5,000 or by imprisonment for a term of not exceeding

15); and that, so far as the record shows, that official has never here attempted to exercise such a power.

9. In that they failed to determine and decree that, at least on striking claimant's appearance, the District Court had lost all jurisdictional power to do anything further in the cause save to dismiss the same for want of jurisdiction.

The basis of the foregoing assignment is claimant's contention that the striking of the appearance of a party who has appeared in response to a citation has the legal effect of recalling the citation and depriving the court of jurisdiction *ab initio*.

10. In that they failed to determine and decree that the District Court had failed to acquire jurisdiction over the cause because of the want of a statute authorizing the forfeiture of title asserted in the libel.

This is based upon claimant's contention that the Act of June 15, 1917, Title II, sec. 3 (*supra*, 4 n.), relied on in the libel as authorizing the alleged forfeiture, was without operative force or effect on March 30, 1941. The Fifth

---

two years: *Provided*, That the Secretary of the Treasury shall have power to remit or mitigate any such fine, penalty, or forfeiture, or to compromise the same in the manner provided by law.

"Sec. 1617. Upon a report by a collector, district attorney, or any special attorney or customs agent, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is hereby authorized to compromise such claims, if such action shall be recommended by the General Counsel for the Department of the Treasury.

"Sec. 1618. Whenever any person interested in any vessel, * * * seized under the provisions of this chapter, * * * files with the Secretary of the Treasury * * * before the sale of such vessel * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without * * * any intention on the part of the petitioner * * * to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto."

Circuit Court of Appeals had so held in *Marchese* v. *United States,* 126 F. 2d 671, 673, in which ruling it had been followed by the Third Circuit Court in *Scaleggeri* v. *United States,* 126 F. 2d 1023. But below the latter Court, reversing itself, chose to follow the Maryland District Court decision to the contrary announced in *United States* v. *The Pietro Campanella,* 44 F. Supp. 348, 351-352.

11. In that they failed to determine and decree that the District Court had failed to acquire jurisdiction over the cause by reason of the want of any allegation in the libel charging the commission of the only offense named in said statute as a ground of forfeiture.

This is based upon claimant's contention that the libel alleges only willful *damage* to the vessel and *permission* to put it to the use named as unlawful in the statute; that the libel alleges no such *actual use;* and that it is only such *actual use* that the statute, when effective, makes a *ground of forfeiture* (*supra,* 4 n.).

12. In that they failed to determine and decree that the District Court had lost all jurisdiction over the cause when the libellant, in the midst of litigating its claim that the "Antoinetta" was its own vessel by reason of forfeiture, requisitioned it as the property of claimant and removed it from the Court's custody.

This is based upon claimant's contention (1) that the Government, in availing itself in peace-time of the new remedy of requisition provided by the Act of June 6, 1941, (*supra,* 6 n.), which, when availed of, in itself nullified the jurisdiction of the District Court, was bound by the terms and conditions imposed by that Act, and could not at its own will reject those and prescribe new terms and conditions of its own, less inimical to its position in the penal

litigation it was then engaged in conducting against the vessel so requisitioned; nor for the sake of that litigation, keep alive a jurisdiction that the Act, when availed of, terminated. One of those statutory conditions was libellant's recognition of title in the foreign owner; whereas the condition it sought to substitute therefor was the denial of such title and insistence on its own. Another statutory condition was the Government's assumption of obligation ultimately to restore the vessel or its value, and pay charter-hire for its use in the interim; in place of which, it chose to substitute the condition that it would so restore and pay for the vessel and her use only in the event the Court should deny its own claim of title. And claimant urged that such new terms and conditions were without force or effect; and that the requisition, accordingly, constituted an abandon-donment of the Government's forfeiture claims, and entailed a loss of the court's jurisdiction. Claimant's contention was accepted in neither court, however, the Circuit Court dismissing it as "as mere play upon words" (R.).

The assignment of error is also (2) predicated upon claimant's contention that removal of the *res* from the District Court's custody, both actual and constructive, pursuant to requisition, deprived the court of its jurisdiction in keeping with the plain intent and purpose of the Act. Neither court accepted this contention; and the Court of Appeals based its dismissal thereof upon three grounds, viz.: (a) That removal of the *res* from the court's custody was without prejudice to the continuance of its *in rem* jurisdiction because both court and libellant said it should be so; (b) that the master was appointed by the court's marshal and the *res* never left the court's custody and control; and (c) that, in any event, the just compensation provided for by the Act of June 6, 1941, constituted a substitute *res*, as would a stipulation for value filed in

court (R.), and that, thus, the Act, instead of purposing the end of the District Court's jurisdiction over the requisitioned vessel, meant, and provided means, to save it.

All three grounds, claimant urges, are untenable: The first two not only because inconsistent with the Act of June 6, 1941, (*supra,* 6 n.), as amended (*supra,* 27 n.), and with the inherent nature of the court's *in rem* jurisdiction, but also because violative of the express terms of the statute (Act of June 17, 1930, c. 497, Title IV, sec. 605; 46 Stat. 754, 19 U.S.C.A. 1605)* made controlling by the act alleged in the libel to have authorized the forfeiture (*supra,* 4 n.); and the third, because the manifest purpose of the Act of June 6, 1941, (*supra,* 6 n.), was to destroy, not save the jurisdiction, and to provide new remedies for those extinguished. So far from providing a substitute *res* to be availed of *in the action against the requisitioned vessel,* the Act, in prescribing just compensation, itself provides that the owner, to recover such as *he* claims, must begin a *new action* in the Court of Claims; and holders of liens and stipulations, to recover such as *they* claim, *new actions* in the District Court; and it leaves *no res* in court or elsewhere to abide the outcome of the *pending action,* either to be exonerated and restored to those parties or to be forfeited and either (if still unbonded) condemned, sold, and distributed as provided in sec. 613 of the Act of June 17, 1930, *supra,* (46 Stat. 756; 19 U.S.C.A. 1613),† or (if bonded) con-

* The cited section reads, as pertinent:

"All vessels * * * seized under the provisions of the customs laws * * * unless otherwise provided by law, shall be placed and *remain* in the custody of the *collector* for the district in which the seizure was made to await disposition according to law." (Emphasis added.)

† This statute reads as follows:

"§1613. Disposition of proceeds of forfeited property

"Any person claiming any vessel, vehicle, merchandise, or baggage, or any interest therein, which has been forfeited and sold under the

demned and distributed as provided in sec. 614 thereof (46 Stat. 757; 19 U.S.C.A. 1614);‡—and, as to the owner, prohibits even the deposit of compensation with the Treasurer of the United States to respond to the former's demand even in a new action in Admiralty (sec. 902 (d),

---

provisions of this chapter, may at any time within three months after the date of sale apply to the Secretary of the Treasury if the forfeiture and sale was under the customs laws, or to the Secretary of Commerce if the forfeiture and sale was under the navigation laws, for a remission of the forfeiture and restoration of the proceeds of such sale, or such part thereof as may be claimed by him. Upon the production of satisfactory proof that the applicant did not know of the seizure prior to the declaration or condemnation of forfeiture, and was in such circumstances as prevented him from knowing of the same, and that such forfeiture was incurred without any willful negligence or intention to defraud on the part of the applicant, the Secretary of the Treasury or the Secretary of Commerce may order the proceeds of the sale, or any part thereof, restored to the applicant, after deducting the cost of seizure and of sale, the duties, if any, accruing on the merchandise or baggage, and any sum due on a lien for freight, charges, or contribution in general average that may have been filed. If no application for such remission or restoration is made within three months after such sale, or if the application be denied by the Secretary of the Treasury or the Secretary of Commerce, the proceeds of sale shall be disposed of as follows:

"(1) For the payment of all proper expenses of the proceedings of forfeiture and sale, including expenses of seizure, maintaining the custody of the property, advertising and sale, and if condemned by a decree of a district court and a bond for such costs was not given, the costs as taxed by the court;

"(2) For the satisfaction of liens for freight, charges, and contributions in general average, notice of which has been filed with the collector according to law;

"(3) For the payment of the duties accruing on such merchandise or baggage, if the same is subject to duty; and

"(4) The residue shall be deposited with the Treasurer of the United States as a customs or navigation fine. (June 17, 1930, c. 497, Title IV, §613, 46 Stat. 756.)"

‡ This statute reads as follows:

"§1614. Release of seized property

"If any person claiming an interest in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter offers to pay the value of such vessel, vehicle, merchandise, or baggage, as determined under section 1606 of this title, and it appears that such person has in fact a substantial interest therein, the collector may, subject to the approval of the Secretary of the Treasury if under the customs laws, or the Secretary of Commerce if under the navigation laws, accept such offer and release the vessel, vehicle, merchandise, or baggage seized upon the payment of such value thereof, which shall be distributed in the order provided in section 1613 of this title. (June 17, 1930, c. 497, Title IV, §614, 46 Stat. 757.)"

Merchant Marine Act, 1936, as amended by the Act of March 24, 1943, c. 26, sec. 3(d), 57 Stat. 49).*

E

Reasons Relied on for the Allowance of the Writs

I. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision as follows:

It has, in its disposition of the first to fifth questions inclusive (*supra,* 17-19), deprived, and sanctioned the District Court's depriving, petitioners of their property without a hearing and in defiance of the applicable guaranties of due process.

It has, in its disposition of the second question (*supra,* 17-18), permitted, and sanctioned the District Court's permitting respondent Government to maintain in court, at one and the same time, two utterly inconsistent positions and remedies, and by means of its assertion of one to bar petitioners from contesting its assertion of the other.

It has, in its disposition of the first, third and fourth questions (*supra,* 17, 18), denied petitioners the right of urging against a judicial remedy based upon capture for enemy ownership the defense that there had never been such a capture and that, if so, the same had exceeded the alleged captor's statutory and constitutional powers.

It has, in disposing of the sixth question (*supra,* 19), permitted respondent Government both to maintain and defend against its own suit and conduct both sides of one and the same litigation.

---

* "* * * the United States Maritime Commission may in its discretion deposit such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims * * *" (Emphasis supplied); that is, *third-person lien claims.*

It has, in disposing of the sixth and seventh questions (*supra*, 19-20), purported to exercise a jurisdiction denied it alike by principles of due process and positive statutory command.

II. The Circuit Court of Appeals' decision of the federal questions here presented (*supra*, 17-20), conflicts with the applicable decisions of this Court, to wit:

Its decision of the first to fifth inclusive, conflicts with *McVeigh* v. *United States*, 11 Wall. 259, *Windsor* v. *McVeigh*, 93 U. S. 274, 277, *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 22, and other cases to the same effect.

Its decision of the second, with *The Sally*, 8 Cranch. 382, 384, and *The Hampton*, 5 Wall. 372, 376; with *Flanigan* v. *Turner*, 66 U. S. 491, *Scholey* v. *Rew*, 23 Wall. 331, 351, and cases following them or kindred thereto; and with *Van Winkle* v. *Crowell*, 146 U. S. 42, 50-51, *Robb* v. *Vos*, 155 U. S. 13, 41-43, and cases to the same effect.

Its decision of the third and fourth, with *Fed. Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649, *Hirabayashi* v. *United States*, 320 U. S. 81, 91-92, and kindred cases; and with *Perry* v. *United States*, 294 U. S. 330, 352, 353, and similar cases.

Its decision of the fourth, with *Stoehr* v. *Wallace*, 255 U. S. 239, 244-245.

Its decision of the fifth, with *United States* v. *422 Casks of Wine*, 1 Pet. 547, 549-550, *Gelston* v. *Hoyt*, 3 Wheat. 246, 314, *The Appollon*, 9 Wheat. 362, 367, and kindred cases; and with *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301, *Markham* v. *Cabell*, (U. S. Sup. Ct.), Adv. Op. No. 76, Dec. 14, 1945, and cases of like character.

Its decision of the sixth, with *Lord* v. *Veazie*, 8 How. 251, *Cleveland* v. *Chamberlain*, 66 U. S. 419, and similar

cases; and with *Becker Co.* v. *Cummings,* 296 U. S. 74, 78, *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118, and cases to the like effect.

Its decision of the seventh, with *United States* v. *Hudson,* 7 Cranch 32, 33, *Brown* v. *United States,* 8 Cranch 110, 123, and similar cases; and with *Jennings* v. *Carson,* 4 Cranch 2, *The Brig Ann,* 9 Cranch 289, 291, *The Rio Grande,* 23 Wall. 458, and cases to the like effect.

III. The decision of the Circuit Court of Appeals is in conflict with the decision of other Circuit Courts of Appeals as follows: With that of the Fifth Circuit Court (*Marchese* v. *United States,* 126 F. 2d 671, 673) regarding the operative force and effect, as of March 30, 1941, of section 3 of Title II of the Act of June 15, 1917.

IV. The Circuit Court of Appeals, in disposing of the first, third and fourth questions (*supra*), has attributed to respondent Government an invulnerability to defense, in its pursuit of judicial remedy, that is in conflict with this Court's applicable decisions in *McVeigh* v. *United States, supra, Windsor* v. *McVeigh, supra,* and cases following them, and with *Hirabayashi* v. *United States, supra,* and kindred cases; and has decided questions that have never been but should be decided by this Court, viz.: (1) Whether property of an alien enemy covered by contract with, and in the possession of, the sovereign United States, nor engaged in trade with any of the citizens thereof, is subject to the terms of the Trading with the Enemy Act; (2) whether property of an alien enemy engaged in lawful intercourse, authorized not by mere license but by contract with the United States, is immune to capture by the latter even under the Trading with the Enemy Act; (3) whether property deposited with the Federal Government by an alien friend in time of peace

under an agreement for the ultimate restoration of the same or its value, with compensation for its use in the meantime, becomes, even under that Act, subject to capture on the subsequent outbreak of war between the Federal Government and the Government of such alien friend; and (4) whether, be that Act applicable or not, the sovereign obligations and debts of the Federal Government, contracted to private men, for value received therefrom, in time of peace, may thereafter, when such men have become enemies by reason of the outbreak of war between the Federal Government and their own, be captured and repudiated.

V. The Circuit Court of Appeals, in disposing of the seventh question, has decided a question that has never been but should be decided by this Court, viz., whether section 3 of Title II of the Act of June 15, 1917, (40 Stat. 220), is effective at all times or only in times of emergency and, in the latter event, when and under what circumstances it became effective in connection with the second World War.

VI. The Circuit Court of Appeals, in disposing of the seventh question, has decided a question that has never been but should be decided by this Court, viz., whether the Idle Foreign Vessels Act (Act of Congress of June 6, 1941; 55 Stat. 242), when availed of by the Federal Government to requisition and take possession of vessels in course of being proceeded against in Admiralty *in rem* actions, including forfeiture suits, destroys the jurisdiction of the Admiralty Courts further to proceed in the same.

VII. The fate of numerous vessels and vessel-titles depends upon the correct solution of the questions raised in this record, argued below and here presented. This

case might, indeed, justly be entitled "The Italian Mercantile Marine." The record shows (R. 31a-40a) twenty-nine cases pending in various District Courts of the United States in which the facts and issues are in all substantial respects identical with those here involved. But there the uniformity ends. The Courts have manifested a wide divergence of judicial viewpoint in severally disposing there of the issues presented here. In brief, it may be said that five types of decision have evolved, viz.: (1) Denial of the Custodian's petition in all respects, with leave merely to intervene granted to that official but so far unavailed of, as typified by the decisions in the District Courts for the Western District of Oregon and the Southern District of Texas respectively, in *The Leme* (unreported) and *The Mongioia* (unreported), a Certified Copy of the order in the first of which, in the absence of opinions, is here exhibited;* (2) acceptance

---

*A certified copy of this order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. 783 in Admiralty
ORDER
UNITED STATES OF AMERICA,
Libellant,
vs.
The Motor Vessel LEME, her engines, boilers, and machinery, tackle, apparel, furniture and equipment.

This matter having come on regularly before the Court upon the petition of Leo T. Crowley, Alien Property Custodian of the United States, to be substituted as a party in place of the claimant, and the Court having considered said motion, the briefs and oral arguments submitted in connection therewith, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that the petition of the said Alien Property Custodian to be substituted as a party in the place of the claimant be and the same is denied, but that the Alien Property Custodian may and he is allowed to intervene herein, and may, from time to time, by intervention, present to the Court such matters as he deems necessary to protect the interests of the Government in his charge.

Dated this 8th day of November, 1944.

JAMES ALGER FEE
Judge

UNITED STATES OF AMERICA
District of Oregon } ss.:

I, LOWELL MUNDORFF, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of ORDER, in

of the Custodian's claim of capture, but denial of his demand for substitution, as typified by the decisions in the District Courts for the District of Maryland (*The Pietro Campanella,* 47 F. Supp. 374) and the Eastern District of New York (*The San Leonardo,* 51 F. Supp. 107); (3) denial of all jurisdiction *ab initio,* as required by the ruling of the Fifth Circuit Court of Appeals in *Marchese* v. *United States, supra;* (4) denial of all jurisdiction after requisition and attempted capture, the position assumed in the District Court for the District of New Jersey and reversed below; and (5) complete compliance with the Custodian's demand, the position assumed by the District Court for the Eastern District of Pennsylvania and affirmed below. But except in the latter two Districts, no decrees as yet have been or could be entered,—in the opinion of counsel,—possessed of the necessary degree of finality to permit appeal, which must there await accordingly the entry of a decree following a dismissal or trial of the forfeiture suit in each District.

Nothing but a decision of this Court can finally determine, according to one controlling rule, the private and public rights and obligations there and here involved; not even a treaty between the interested sovereigns, since no treaty, any more than a legislative act, can save a constitutional sovereign from constitutional obligation, or barter or cut off right that his constitution assures to private men.

---

cause No. 783 in Admiralty, UNITED STATES OF AMERICA *vs.* The Motor Vessel LEME, her engines, boilers, and machinery etc. has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 27th day of November, 1944.

LOWELL MUNDORFF, Clerk,
By F. L. Buck, Deputy Clerk
Chief

(SEAL)

In this situation, it would seem to be more than ordinarily appropriate, even apart from the high considerations of justice otherwise here present, that this Court act favorably upon the petition here presented, and consent to a review of the proceedings had below, to the end that the true rule of decision applicable to all the foregoing cases be speedily and authoritatively settled, uniformity and certainty introduced where widespread diversity and doubt now prevail, and a mass of otherwise unnecessary and wasteful litigation thus averted.

Wherefore, your petitioners respectively pray that writs of certiorari be issued by this Honorable Court in the above-entitled causes to the Circuit Court of Appeals for the Third Circuit, requiring the latter to certify the said respective causes to this Honorable Court to the end that the questions involved therein may here receive due attention and consideration, and that the decrees respectively entered therein by the said Circuit Court may be reversed accordingly.

GIUSEPPE BOZZO FU LORENZO
A. T. ROSASCO
MARIANO MARESCA AND COMPANY
"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE
All by HOMER L. LOOMIS,
Counsel for Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

HOMER L. LOOMIS, being duly sworn, deposes and says that he is a member of the bar of this Honorable Court and counsel for the respective petitioners above named; that he has read the foregoing petition and is familiar with its contents and that the same is true to the best of his knowledge, information and belief; that the reason why the said petition is verified by deponent instead of by the said respective petitioners is that none of the latter is present within the United States of America and he is duly authorized to make this verification on their behalf and stead. And deponent, as their counsel, hereby certifies that, having read the foregoing petition, he is of the opinion that it sets forth a proper case for the granting of the writs of certiorari prayed for; and further certifies that it is not filed for purpose of delay.

HOMER L. LOOMIS,
Counsel for Petitioners.

Sworn and subscribed to before me }
this 17th day of April, 1946 }

GEORGE SALTOUN
Notary Public, New York County
N. Y. Co. Clk's No. 15, Reg. No. 324-S-7
Bronx Co. Clk's No. 48, Reg. No. 202-S-7
Kings Co. Clk's No. 62, Reg. No. 398-S-7
Commission Expires March 30, 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

GIUSEPPE BOZZO FU LORENZO, as owner of the STEAM VESSEL ANTOINETTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

A. T. ROSASCO, as owner of the STEAM VESSEL SANTA ROSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

MARIANO MARESCA AND COMPANY, as owner of the STEAM VESSEL MAR GLAUCO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the STEAM VESSEL BELVEDERE, her engines, boilers and machinery, tackle, apparel, furniture and equipment,
Petitioner,

against

UNITED STATES OF AMERICA

and

LEO T. CROWLEY, Alien Property Custodian of the United States,
Respondents.

BRIEF IN SUPPORT OF PETITION

A

Introductory Statements

1

Report of Opinions Below

The opinion of the Court of Appeals, announcing its decision of affirmance, is reported in 153 F. 2d 138. No opinion was delivered by it on its denial of the petition for a rehearing.

The opinion of the District Court is reported in 49 F. Supp. 148.

2

Basis of Jurisdiction

The basis of this Court's jurisdiction is set forth in the Petition (*supra,* 17).

3

Specifications of Error

Petitioner's * specifications of error are set out in the Petition (*supra,* 20-38).

B

Argument

Summary of Argument

Petitioner was entitled under the guaranties of due process to defend his property when assailed, as it here was, in court (Const., 5th Am'd't.; *McVeigh* v. *United*

* The term "petitioner" as used herein, refers to the petitioner Giuseppe Bozzo fu Lorenzo, not only for himself, but as typical and representative of the other petitioners respectively in the other above-entitled causes, on behalf of all of whom this brief is submitted.

States, 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 274, 278; *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* 248 U. S. 9, 22). This right he was denied, though he had been cited to appear and defend, his appearance and proffered defense were rejected and himself driven from court and adjudged and decreed to be without any property right in the *res* he had sought to defend as his own.

The theory upon which the lower courts proceeded was (1) that a claimant's right to a trial of his defense of title to a *res* against the Federal Government's asserted forfeiture title does not survive a valid determination by the court adverse to his title; (2) that here the court had made a determination adverse to his title by finding that the same either had been forfeited for crime on March 30, 1941, or had been captured for enemy ownership on July 22, 1942; (3) that, therefore, petitioner here had no right to a trial of his defense of title.

The prime trouble with that reasoning is that, in making the determination referred to in the second premise, the court assumed that it *could validly* make, and *had validly* made, such determination *without a trial.* The court thus begged the whole question, by assuming the very thing to be proved. Its reasoning amounted to no more than this: Petitioner was entitled to no trial of his defense of title, because *without a trial* the court had found he had no title to defend.

Petitioner was entitled to a trial of his defense of title to the *res* against both adverse claims asserted in court, that of forfeiture for crime and that of capture for enemy ownership, (cases cited, *supra,* 48-49). But neither claim could be tried save at the appropriate time. If the court had jurisdiction, the time was appropriate for the trial of the asserted forfeiture title. But there could be no appropriate time for trial of the claim of title by capture

until, in any event, the claim of title by forfeiture was out of the way (*The Sally,* 8 Cranch. 382, 384; *The Hampton,* 5 Wall. 372, 376). For the two claims were utterly inconsistent and could not be asserted at one and the same time: One and the same party could not at once occupy the two irreconcilable positions (*Flanigan* v. *Turner,* 66 U. S. 491; *Scholey* v. *Rew,* 23 Wall. 331, 351; *Railway Co.* v. *McCarthy,* 96 U. S. 258, 267-268; *Hopkins* v. *Grimshaw,* 165 U. S. 342, 357; *Pease* v. *Rathbun-Jones Eng. Co.,* 243 U. S. 273, 277; *Norfolk Southern R. R. Co.* v. *Chatman,* 244 U. S. 276, 281-282); nor pursue the two irreconcilable remedies (*Van Winkle* v. *Crowell,* 146 U. S. 42, 50-51; *Robb* v. *Vos,* 155 U. S. 13, 41-43; *Stuart* v. *Hayden,* 169 U. S. 1, 15; and *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 294-295). Here, the only event in which the claim of title by forfeiture could be out of the way prior to its trial, was the District Court's want of jurisdiction over that claim. The District Court *was* without jurisdiction over that claim (cases cited *infra,* 111-126). The court was, therefore, at once in a position to pass upon the claim of title by capture.

That claim of title by capture was bad on the face of the record for several reasons, viz.: (1) It was bad on the face of the record because that showed that petitioner's property in the "Antoinetta" had from and after a time anterior to the outbreak of war been engaged, and at the time of the alleged capture was still engaged in lawful trade not with private American citizens under the revocable permission of a license, but, instead, with the United States Government under the irrevocable permission of a vested contract right authorized by Congress and concluded with the sovereign United States itself, whereunder the petitioner's property was to be respected and restored, either in kind or in value, at the conclusion of

the contract service, together with hire for its use in the meantime; that the Trading with the Enemy Act (*supra*, 10 n.) was in no event applicable, since that Act was designed to cover property engaged or held in *private* trade by *private citizens*, not that engaged or held under public contractual relations between the American sovereign and its enemy owner (S. Repts. Nos. 111, 113, pp. 1, 10-11, 15, 16, 18, 19, 65th Cong., 1st Sess.); and that, if applicable, that Act by necessary implication granted immunity to enemy property engaged in such public intercourse and under such a sovereign contract. (2) It was bad on the face of the record because that showed that the only property petitioner possessed in the *res* at the time of the alleged capture consisted in and of the sovereign contractual obligation or debt of the United States to restore the vessel, in kind or value, to petitioner at the close of the requisition service with just charter hire for its use in the meantime (R. 23a; Const., 5th Am'd't.; Act of June 6, 1941, *supra*, 6 n.): And it was not in the statutory or constitutional power of the Federal Government to capture the sovereign's own contractual obligation or debt, for to attempt such a thing was nothing more nor less than to attempt its repudiation; which was forbidden, not only because Congress *could not* authorize it (Const., 14th Am'd't., sec. 4; *Perry* v. *United States*, 294 U. S. 330, 352, 353, 379-380), but also because Congress *had not* authorized it even in the Act relied on by the would-be captor (Trading with the Enemy Act, *supra*, 10 n.; authorities cited *infra*, 71-99). (3) It was bad on the face of the record because that showed the vessel *res* to be a deposit which was accepted on the public faith by the Federal Government from petitioner in peace-time and to the return of which, in kind or value, with hire for its use in the meantime, the public faith was plighted; and

that, therefore, despite the ensuing war, it was immune to capture, as was that public faith to repudiation (Const., 14th Am'd't, sec. 4; *Perry* v. *United States, supra;* authorities cited *infra,* 84-90). (4) It was bad on the face of the record because that showed that the alleged captor had found no property in the *res* that was subject to capture and, instead, left to the court the determination whether there was any such (R. 28a, 30a; *Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.,* [D. C., S. D. N. Y.], 17 F. 2d 174, 175, 178).

The reasoning of the court, as expounded *supra* (49), also was fallacious in that its first premise,—that is, that petitioner's right to a trial of his defense of title did not survive a determination by the court adverse to his title,—was insupportable unless limited in its terms to the case of a determination by the court (1) that petitioner's title had been lost prior to seizure of the *res* for forfeiture; and (2) that, when so lost, it had carried with it every legally valuable benefit petitioner might thereafter otherwise reap from an adjudication that such seizure was tortious, or at least unsustainable. For, (a), so long as petitioner held title at the time of that seizure, it was he who was thereby damaged and possessed the right to sue the seizor for damages if such seizure was tortious and, therefore, possessed the right to prove such seizure tortious; which could be proved nowhere else than in the trial of the claim of title by forfeiture and not otherwise than by the defeat of that claim (*Gelston* v. *Hoyt,* 3 Wheat. 246, 314; *The Apollon,* 9 Wheat. 362, 367; *United States* v. *422 Casks of Wine,* 1 Pet. 547, 549–550). And, (b), so long as petitioner, despite such loss of title, would, from a defeat of the asserted forfeiture title, reap, by reason of the very fact of his quondam title, a legally valuable benefit, it was his right to seek that defeat and

save that benefit (*The Beaconsfield,* 158 U. S. 303, 307; *Pendleton* v. *Benner Line,* 246 U. S. 353, 356; *The Kaiser Wilhelm II* [C. C. A., 3rd Cir.], 246 Fed. 786, 789; *Queenan* v. *Mays* [C. C. A., 10th Cir.], 90 F. 2d 525, 534-535; *The Regina del Mare,* Br. & L. 315, 316; *Chipman* v. *City of Hartford,* 21 Conn. 488, 498). And such a benefit petitioner, if he succeeded in defeating the asserted forfeiture title, was in a position here to preserve, viz., the continued trusteeship of the alleged captor of the *res* for the benefit of petitioner's American creditors and, to the extent their claims were so satisfied, his freedom from any and all further personal liability therefor (Trading with the Enemy Act, sec. 9(a), *supra,* 11n.; *White* v. *Mechanics Securities Corp.,* 269 U. S. 283, 301; *Markham* v. *Cabell* (U. S. Sup. Ct.), Adv. Op. No. 76, Dec. 14, 1945).

The Alien Property Custodian in no event had any right to succeed to the defense of petitioner's claim of title because the former was but an agent of the libellant, and to permit him to defend was but to permit the libellant to defend against libellant's own suit (*Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 603; *Becker Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118). Such identity of interest must at once destroy the court's jurisdiction to try the cause, at least as against petitioner's property therein (*Lord* v. *Veazie,* 8 How. 251; *Cleveland* v. *Chamberlain,* 66 U. S. 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333; *Globe & Rutgers Fire Ins. Co.* v. *Hines* [C. C. A., 2d Cir.], 273 Fed. 774, 777, 778).

The Circuit Court, apparently conceding as much, nevertheless held that such loss of jurisdiction to try libellant's asserted forfeiture title to petitioner's property in the *res,* would still leave at least *some* controversy within the court's jurisdiction, viz., such controversy as

might develop between third-person mortgage, maritime, attachment and stipulation lien-holders, *if any,* on the one hand, and libellant on the other. But herein the court erred: For (1) the statute (Act of June 15, 1917, Title II, sec. 3, *supra,* 4 n.), relied on as authorizing the forfeiture, authorized only the forfeiture of the *res,* not of specific interests therein; (2) it did not authorize the forfeiture of the liens of presumably innocent third persons and the remission of the penalty to the only interest charged with its violation, to-wit, the owning interest; and (3) so to enforce it against the former and withhold its enforcement against the latter, would violate the law giving power of remission to the Secretary of the Treasury alone, and that, too, only on his first finding the absence of the very criminality charged in the libel (Act of June 17, 1930, c. 497, Title IV, secs. 616-618, *supra,* 32 n.). The substitution of libellant in petitioner's role of claimant would defeat the court's jurisdiction, not merely over a part, but over the whole, of the forfeiture cause.

The court's want of jurisdiction to try the Federal Government's asserted forfeiture title, which alone, as pointed out *supra* (49-50), could confer upon it a present jurisdiction to try the Government's asserted captor's title, was due (1) to the libel's alleging, as the statute authorizing forfeiture, one without force or effect at the time of the offense charged in the libel; (2) to the libel's alleging, as the offense giving rise to the alleged forfeiture title, one not made by that statute a ground of forfeiture; (3) to the Government's requisitioning the *res* as petitioner's property, and not its own,—after it had filed its libel on the contrary theory,—and in connection with said requisition, availed itself of a statute designed to destroy the court's jurisdiction and subscribed to terms and conditions inconsistent with the further exercise thereof; and

(4) to its depriving the court of custody of the *res* so requisitioned and thereby destroying the only basis of jurisdiction upon which the court was authorized to proceed with the *in rem* cause.

FIRST POINT

The decree affirmed below, in denying Petitioner the right to continue his defense of title to the Vessel "Antoinetta" against libellant's asserted forfeiture title, striking his appearance and defense, and adjudicating without a trial that he stands without a property right in the *res*, violated his guaranties of due process, was beyond the Court's judicial power and is unsustainable for any purpose.

An alien enemy is entitled to defend his property in court when it is there assailed. That principle of due process has been announced by this Court more than once and with more than ordinary emphasis. In reversing a default decree pronouncing against the title of one who had appeared and sought to defend, as his own, property libelled as forfeit to the Federal Government, but whose appearance and defense had been stricken on the Government's motion because of his being an alien enemy, this Court, speaking by Mr. Justice Swayne, said in *McVeigh* v. *United States,* 11 Wall. 259, 267:

> "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion wil be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence

> could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principle of the social compact and of the right administration of justice."

Such right of defense, it was there pointed out, is not partial or limited, but full and entire.

> "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."
> (*Id.*, 267).

This principle applies as well in the defense of one's property as of one's person. Thus, in holding worthless a title to property acquired under such a decree of condemnation and sale, this Court, in *Windsor* v. *McVeigh*, 93 U. S. 274, 277, in an opinion delivered by Mr. Justice Field and after quoting from the language of Mr. Justice Swayne first set out above, said:

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

To oust, from litigation seeking the condemnation of property in an *in rem* action, one appearing, as petitioner here appeared, in response to a citation, is, this Court there pointed out, tantamount to recalling the citation.

> "That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. * * * But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.
>
> "The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."
>
> *Id.*, 277-278.

Nor, said this Court, does the fact that the action is *in rem* and that the *res* is still in the court's custody

justify a further exercise of jurisdiction after the citation has been recalled.

> "The position of * * * counsel is, that, as the proceeding for the confiscation of the property, was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however, erroneous, cannot, therefore, be collaterally assailed. * * * But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. * * * The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question *after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges.*" (Emphasis supplied.)
>
> *Id.*, 278-279.

In *Watts, Watts & Co.* v. *Unione Austriaca, etc.*, 248 U. S. 9, 22, this Court said it was a matter "of course" that an alien enemy is "entitled to defend before a judgment should be entered."

The right has now been expressly declared by Congress in the Trading with the Enemy Act (sec. 7b, *supra*, 10 n.), whose declaration "that an enemy * * * may defend by counsel any suit or action at law which may be brought against him", is but a reaffirmation of the doctrine expounded in *McVeigh* v. *United States, supra*, and *Windsor* v. *McVeigh, supra*, (S. Repts. Nos. 111 and 113, pp. 21, 24, 65th Cong., 1st sess.; *Ex parte Colonna*, 314 U. S. 510, 511). And this Court, in so indicating, in *Ex parte Colonna, supra*, cited, among other cases, *Porter* v. *Freudenberg* [1915], 1 K. B. 857, where the British

Court of Appeal, in following *McVeigh* v. *United States, supra,* and upholding an alien enemy's right to defend against adverse litigation and appeal from adverse judgment, said (883-884):

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of Justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.
>
> Equally it seems to result that, when sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. *Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant.* The decision in *McVeigh* v. *United States* (*supra*) in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those Courts" (Emphasis supplied).

Here the District Court did, and the Circuit Court of Appeals sanctioned its doing, what this Court had condemned in *McVeigh* v. *United States, supra,* and *Windsor* v. *McVeigh, supra.* Though purporting to recognize and respect the alien enemy's right of defense while it remained uncaptured, they nevertheless held that under the law the Government, the libellant, could capture that right of defense and thus nullify it altogether; that the Government could take in two steps what this Court, in the cases cited, had condemned when taken in one.

a

The lower courts arbitrarily denied petitioner the right of defense guaranteed him by law.

The lower courts did not avowedly question the soundness and authority of those decisions and that law (Const., 5th Am'd't.; Trading with the Enemy Act, sec. 7 (b), *supra,* 10 n.), but held, in substance, that the principle of right they declared could be rendered inoperative at executive will and by executive action. The District Court, in espousing that doctrine, pointed to *Ex parte Kumezo Kawato,* 317 U. S. 69, as its parent; and this, because of certain language appearing therein. The District Court said, in its analysis of that opinion, that this Court had "significantly" there "declared that the rights of even resident enemy aliens may be abrogated" by "administrative or legislative action" (R. 54a). And so, the District Court concluded the executive or Congress might all the more appropriately so abrogate the rights of non-resident alien enemies such as is petitioner; and that that is just what the executive did here, viz., "the government, acting through its executive branch under legislative authority, has abrogated the rights of the claimant here * * *" (R. 55a); that is, the claimant's rights of defense.

That reasoning is fallacious because the language of this Court in the *Kawato* case, so invoked, referred at most, as the context plainly shows, to the "rights" of *suit* of resident aliens of enemy nationality; in *no* respect to their rights of *defense* when they themselves or their property was the object of suit. This Court there simply pointed out that it was within the executive power to place such residents in the category of non-resident alien enemies and thus deprive them of their *right to sue* in our courts; not that the executive had the power to take away from either class their *right to defend.*

Petitioner's right of defense represented to the District Court a mere "chose in action". And so, it concluded, since this Court had "significantly" in *United States* v. *Chemical Foundation,* 272 U. S. 1, "upheld the right of the Custodian to seize and to sell 'choses in action' " (R. 56a), he might here do the same with petitioner's right of defense. Said the Court (R. 56a):

> "In the instant case, in the final analysis, the substance of the dispute between the claimant and the Custodian is the claimant's assertion of his property interest in a *chose in action—a right to defend* * * *" (Emphasis supplied);

and therefore concluded that *United States* v. *Chemical Foundation supra,* along with *Cummings* v. *Deutsche Bank supra,* was

> "dispositive of the issue involved in the case at bar" (R. 57a).

The Circuit Court of Appeals did not expressly undertake to uphold the power of the executive department thus *directly* to set at naught the law guaranteeing the alien enemy's right of defense. But neither did it chal-

lenge the District Court's assertion that such power *did in fact* exist.

And that the executive department might exercise such power *indirectly,* through the device of "capture", neither court had any doubt. In this, they accepted the following argument of Government counsel, viz.: That it is not in *every* case that the property which an alien enemy is engaged in defending in our courts as his own, is captured by the Custodian; that in *some* cases the Custodian still permits the alien enemy to retain his property; that in *such* cases, *but such only,* the alien enemy retains his right of defense; and that, therefore, the cases, the Fifth Amendment and the saving clause of the statute are *not altogether* dead letters, although the Custodian *has* it in his power to render them such in *every case,* by the simple device of "capturing" that which is defended.

But the trouble with that line of reasoning is that it forgets that, to defeat the right of defense in such case, the captor must come into court and pursue a judicial remedy for the affirmative relief he seeks, viz., the ousting of the alien enemy; must predicate his right to such judicial relief on his alleged captor's title; and, before establishing his right to such judicial relief, must prove the validity of his title. And the court, thus, in an *in rem* action, where the original issue is one of title, so far from being relieved—by the alleged captor's intervention—of the necessity of trying the defender's claim of title against that of the libellant, is but burdened with the additional necessity of now trying also the defender's claim of title against that of the alleged captor; and, where libellant and the alleged captor are different entities, their conflicting claims of title *inter sese* as well (*The Sally,* 8 Cranch. 382, 384). But where, as here, the libellant and the alleged captor are one and the same party, and the

former's asserted title is wholly inconsistent with the latter's, the latter's claim of title cannot even be offered or heard; at least, until the former's is out of the way (*The Hampton*, 5 Wall. 372, 376).

The line of reasoning counsel thus induced the lower courts to take to the contrary effect,—that is, that intervention by capture relieved the courts of the necessity of trying petitioner's defense of title at all,—amounted to a simple begging of the question; and to a denial out of hand, of petitioner's right of defense,—without a reason and in violation of the decided cases and their law as declared in the Fifth Amendment and the Trading with the Enemy Act (*supra*, 10 n.).

Thus, the reasoning of the lower courts was as follows: An alien enemy is not entitled to a trial of his defense of title to a *res*, against the Government's asserted ownership thereof by forfeiture, after the court determines he has no title to defend; the court has here determined, without a trial, that petitioner, an alien enemy, has no title to defend, because it has determined, without a trial, that he lost the same either by forfeiture for crime on March 30, 1941, or by capture for enemy ownership on July 22, 1942; therefore, petitioner is not entitled to a trial of his defense of title.

But, as will at once be seen, this reasoning leads nowhere, because the second premise assumes the truth of the conclusion, the thing to be proved. In assuming that the Court *may validly* determine and that the Court *has validly* determined *without a trial* the absence of title in petitioner, it has assumed that petitioner is in no event entitled to a trial of his defense of title. And the whole of the so-called reasoning amounts to no more than saying that petitioner, an alien enemy, has no right to a trial of his defense of title simply because the Court has

said so. And that is nothing but an arbitrary denial of the due process this Court, the Fifth Amendment and the Trading with the Enemy Act have declared petitioner shall have.

b

It was not open to Government to offer, nor to court to hear, the former's assertion of title by capture for enemy ownership, at least until its assertion of title by forfeiture for crime was out of the way.

The libel claim of title by forfeiture, for crime, if ultimately made good, placed petitioner's whole title in the Government not later than March 30, 1941 (*Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *Henderson's Distilled Spirits*, 14 Wall. 44, 57; *United States* v. *Stowell*, 133 U. S. 1, 16; *The Annandale*, (C.A.), 2 P.D. 218, 220, aff'g. 2 P.D. 179, 185). And its capture by the same Government thereafter on July 22, 1942, would, in that event, have been an impossibility. Therefore, at least while the Government presses its original claim of title by forfeiture for crime as of March 30, 1941, it cannot be heard to press the contrary claim of subsequently acquired title by capture for enemy ownership as of July 22, 1942, or to aid the judicial establishment of the first by the assertion of any right predicated upon the second (*The Sally*, 8 Cranch. 382, 384; *The Hampton*, 5 Wall. 372, 376).

The Government's reliance upon the first position estops it from profiting, at least at the same time, from the second (*Scholey* v. *Rew*, 23 Wall. 331, 351; *Flanigan* v. *Turner*, 66 U. S. 491; *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267-268; *Hopkins* v. *Grimshaw*, 165 U. S. 342, 357; *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273, 277; *Norfolk Southern R. R. Co.* v. *Chatman*, 244 U. S. 276, 281-282).

Its pursuit of the *res* as forfeited to it in 1941, estops it from pursuing, at least concurrently, the same *res* as captured by it in 1942 (*Van Winkle* v. *Crowell,* 146 U. S. 42, 50-51; *Robb* v. *Vos,* 155 U. S. 13, 41-43; *Stuart* v. *Hayden,* 169 U. S. 1, 15; and *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 294-295).

c

The lower courts arbitrarily and without right denied petitioner a trial of his defense against the Government's claim of title by capture.

The appropriate time for a trial of the claim of title by capture could at best occur, as shown *supra* (64), only after the conflicting claim of title by forfeiture was out of the way.

But if, as petitioner argued below and argues here (*infra,* 111-126), the District Court was already without jurisdiction over the cause of title by forfeiture, the cause of title by capture (if its assertion here was at all open to the Government) was presently ripe for consideration. Petitioner denied that asserted title by capture and undertook to defend against it. This claimed right of defense, however, the lower courts refused, saying in effect that they could not question, nor petitioner dispute, the alleged title by capture. For this position the Court of Appeals mistakenly relied upon *Hirabayashi* v. *United States,* 320 U. S. 81, which decided at most that the exercise of judgment or discretion within a clear congressional grant of constitutional power cannot be questioned judicially; not that the legislative grant or its constitutionality is not open to inquiry. In precluding petitioner from disputing here the existence and constitutionality of such a grant of power, the lower courts

violated his guaranties of due process quite as much—and for the same reasons—as they transgressed them in denying his claimed right of defense against the asserted title by forfeiture (*Fed. Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649). The validity of petitioner's defense against the claim of title by capture appears from the following Point.

SECOND POINT

The Government's claim of title by capture was unsustainable on the face of the record.

The face of the record showed the Government's claim of title to petitioner's property by capture to be without merit.

Petitioner's sole property in the *res*, at the time of the alleged capture of that property, was engaged in public intercourse with the sovereign United States itself under the terms of a contract authorized by an act of the Congress of the United States (Idle Foreign Vessels Act of June 6, 1941, *supra*, 6 n.). The Trading with the Enemy Act of October 6, 1917, *supra*, was therefore not applicable; but, even if so, that Act by necessary implication granted to that property, so engaged in that public intercourse, immunity to capture.

a

The Trading with the Enemy Act was without application either to petitioner's property or to the public contract whereunder it was possessed and operated by the American sovereign.

The Custodian had at most no more of the power of capture conferred upon the Congress by the Constitution (Art. 1, sec. 8, cl. 11; *Brown* v. *United States*, 8 Cranch

110, 126; *Miller* v. *United States,* 11 Wall. 268, 305; *Stoehr* v. *Wallace,* 255 U. S. 239, 241-242) than that which the Congress had conferred upon the President in the Trading with the Enemy Act as amended (*supra,* 10 n.).

That Act was meant to curb the *citizens* in *their* dealings with enemies and enemy property; *not* to curb the *sovereign* in *his.*

That this must be so is manifest not only from the face of the Act, but from the avowed purpose for which it was adopted. It nowhere purports to authorize the capture of enemy property possessed and operated by the sovereign in his public business under a contract between him and private enemy owner. Indeed every "person" prohibited from doing the things proscribed by the Act is by its own terms defined so as expressly to exclude reference to the sovereign (sec. 2, *supra; United States* v. *Cooper Corp.,* 312 U. S. 600, 604, 606, 607; *United States* v. *Securities Corporation General* [C.A. D.C.], 4 F. 2d 619, 622, affd. in *White* v. *Mechanics Securities Corp.,* 269 U. S. 283).

The avowed purpose of the Act was to adopt, as United States statute law, that rule of the law of nations which interdicted all commercial intercourse between *citizens* of one belligerent and the other; *not* to curb, cripple or control, contrary to the law of nations, the power of the *sovereign* to deal with enemy citizens and their property (S. Repts. Nos. 111, 113, pp. 1, 10-11, 15, 16, 18, 19, 65th Cong., 1st sess.; *The Rapid,* 8 Cranch 155, 161; *Scholefield* v. *Eichelberger,* 7 Pet. 586, 593; *The William Bagaley,* 5 Wall. 377, 405, 407; *Hanger* v. *Abbott,* 6 Wall. 532, 535, 536; *Coppell* v. *Hall,* 7 Wall. 542, 554, 557, 558). That power of the sovereign the Act left not only untrammeled but expressly recognized (Trading with the Enemy Act, sec. 5a, *supra,* 10 n.).

That the rule of the law of nations thus incorporated into our statute law imported a prohibition—of intercourse with

the enemy—*to the citizens, not to the sovereign,* plainly appears from the authorities.

This Court said in *Scholefield* v. *Eichelberger, supra,* 593:

> "The doctrine is not at this day to be questioned; that during a state of hostility *the citizens* of the hostile states are incapable of contracting *with each other* * * * at present it may be safely affirmed that there is no recognized exception but *permission* of a *state* to its *own citizens* * * *." (Emphasis supplied.)

In *The William Bagaley, supra,* 405, this Court said:

> "Public war, duly declared or recognized as such by the war-making power, imports a *prohibition by* the sovereign *to* the *subjects or citizens* of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country." (Emphasis supplied.)

It is, according to the rule, a prohibition from the sovereign to the *subject* that the war imports; *not* a prohibition from the sovereign to *himself.* Under the rule, the sovereign not only may himself still deal with enemy citizens and enemy property, but may authorize his own citizens to do so. Said this Court in *Hanger* v. *Abbott, supra* (535):

> "Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, *except under a government license,* subjects the property to confiscation, or to capture and condemnation." (Emphasis supplied.)

That is, when the trade is authorized or conducted by the sovereign, the property involved therein is immune "to confiscation, or to capture and condemnation." Just

as, when the trade is *not* authorized, a non-enemy's property engaged therein takes on the character of *enemy* property (*The Rapid, supra,* 162-163); so, when the trade *is* authorized, an enemy's property engaged therein takes on the character of *non-enemy* property (Trading with the Enemy Act, sec. 7c, *supra,* 10 n.). For as to *all* property engaged in authorized dealings with the enemy,—whether it be owned by the enemy or by non-enemy,—there is a *suspension* of hostilities; for there cannot be at one and the same time for one and the same property "war for arms and peace for commerce." As this Court in *Coppell* v. *Hall, supra,* said (554):

> "The sovereign may license trade, but in so far as it is done, it is a *suspension of war,* and a *return to the condition of peace.* It is said *there cannot be, at the same time, war for arms and peace for commerce.*" (Emphasis supplied.)

Thus, petitioner's property in the "Antoinetta", possessed and operated, as it was, by the American sovereign during the war under a requisition-charter contract concluded between them, was *quoad hoc* the property of a *friend* and *not* the property of an *enemy;* and, hence, no more subject to the terms of the Trading with the Enemy Act or capturable thereunder than would be property of an American citizen taken over and operated by the American sovereign under the terms of a requisition-charter contract.

The case celebrated as providing the first authoritative expression of the law of nations incorporated into the statute law of the United States in the enactment of the Trading with the Enemy Act, is *The Hoop,* 1 C. Rob. 196. The remarks of Sir W. Scott in deciding that case are, therefore, of particular interest. He said in part (198 *et seq.*):

"In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which *all subjects* trading with the public enemy, *unless with the permission of the sovereign,* is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law—'From the nature of war, trade between enemies must cease. Though there be no special prohibition of commercial dealings, still trade is forbidden by the war *ipso facto,* the declaration of war itself is enough,'* etc. He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities, have sometimes so far overpowered this rule, that different species of traffick have been permitted. * * * *But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war quoad hoc.* * * *

"By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. *He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war.*"

It thus results that, while petitioner was an enemy in the sense that he was during the war a resident of Italy, he was not so as to his property in the "Antoinetta"; as to that, at all times during the war, he was a friend, and his property therein, the property of a friend. Hence, insofar as the "Antoinetta" and his property therein were concerned, the Trading with the Enemy Act was wholly without application; and any attempted capture thereunder of that property, wholly unsustainable.

* Translation of Bynkershoek's Latin as quoted by Sir W. Scott.

b

The Trading with the Enemy Act by necessary implication denied to Government a right to capture petitioner's property.

By Section 7(c) of that Act property of an enemy alien holding a license from the President and engaged in trade with a private American citizen is expressly saved and excepted from the Custodian's power of capture. Such exception would doubtless be implied in any event; else the President's license to enter, would be no better than the spider's to the fly.

But the grant of immunity to capture, whether express or implied, in the case of enemy property operated here by license, creates by necessary implication at least as great an immunity in the case of enemy property operated here by invitation of the American sovereign or in performance of a contract with the American sovereign. For license, which itself may be implied as well as express (*McKee* v. *Gratz,* 260 U. S. 127, 136), is a necessary ingredient of invitation or contract. To the itinerant peddler or book agent, it may have to be expressed; not so, to the gardener or maid. He who lures or induces—not to say, compels—another to trust person or property to his control or possession, owes more of an obligation thereto than he would to the person or property of a mere licensee (*Bennett* v. *Railroad Company,* 102 U. S. 577, 580; *N. Y. Central R. Co.* v. *The Talisman,* 288 U. S. 239, 241-242; *Travelers Assn.* v. *Prinsen,* 291 U. S. 576, 581). That which, when confined to license, is mere permission (*Gibbons* v. *Ogden,* 9 Wheat. 1, 213) and revocable at will (*De Harov* v. *United States,* 5 Wall. 599, 627), becomes, when coupled with invitation or contract, an irrevocable obligation.

It must then follow by necessary implication that the Act itself meant to, and did, make immune from capture the property of an alien enemy engaged in trade not with private citizens under a mere license revocable at will, but in trade with the sovereign United States itself, under a contract authorized by Congress and creative not of mere permission, but of vested right.

That, on the face of the record, petitioner had such a vested right in respect to the "Antoinetta" and its operation under requisition-charter, seems clear. While the Governments of the United States and Italy were still at peace, petitioner's vessel had been taken by the United States to be used by the United States for the national purposes of the United States. That alone would have raised by necessary implication under the Constitution (Fifth Amendment)* a contractual obligation or debt running from the sovereign United States to petitioner, even apart from the express terms of the Act of June 6, 1941 (*Phelps* v. *United States,* 274 U. S. 341, 343; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489; *United States* v. *Pink,* 315 U. S. 203, 228). But the Act of June 6, 1941, authorizing the taking that occurred here, expressed what otherwise would thus have been implied, and declared (*supra,* 6 n.) that "just compensation shall be determined and made to the owner * * * of any such vessel"; and further declared, through incorporation of section 902 of the Merchant Marine Act of 1936 (*supra,* 7 n.), that

> "such property shall be restored to the owner in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition."

---

* "* * * nor shall private property be taken for public use, without just compensation."

And, in like manner (*supra*, 7 n.) it declared that the Maritime Commission

> "at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property, and for the services required under the terms of such charter."

And it further so declared that, in the event the owner of such vessel deemed the rate of hire so provided in the charter to be less than just compensation for such charter service, he might accept 75 per centum of the rate named in the charter and sue for the balance; that

> "such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use."

And, in the event of loss or damage to the vessel, "due to operation of a risk assumed by the United States under the terms of a charter," it likewise declared (*supra*, 7 n.),

> "the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage."

And, finally and in the same manner, it declared (*supra*, 7 n.) that, in respect to any and all just compensation so payable in respect to the vessel so taken or her use so availed of,

> "the just compensation • • • shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by" the Tucker Act, March 3, 1887, c. 359, 24 Stat. 505, as amended (28 U.S.C.A., secs. 41 (20), 250).

The Act of June 6, 1941, thus explicitly defined the character of the contractual obligation or debt the sovereign United States assumed toward petitioner on and in consideration of its taking over his vessel "Antoinetta" on September 29, 1941, under the terms of the requisition charter thereafter to be executed.

Nor does the fact that that charter has not yet been tendered to petitioner for execution and was compelled by requisition, alter the essential nature of the transaction (*Elliott Steam Tug Co.* v. *Admiralty Commissioners*, [H.L.], [1921] 1 A.C. 137, 141, 143, 145).

Continued performance of that charter by the Maritime Commission, as the agent of the President, on the outbreak of war between Italy and the United States constituted trade with the enemy as defined by the Trading with the Enemy Act.

> "The words 'to trade', as used herein, shall be deemed to mean—

"c. Enter into, carry on, complete, or perform any contract, agreement, or obligation."

Trading with the Enemy Act, sec. 2 (*supra,* 10 n.).

But such trade was expressly authorized not only by Congress but by the President as well. It was he himself that was conducting it through the Maritime Commission and later through its successor, the War Shipping Administration.

The "Antoinetta", whose requisition charter he had authorized the Maritime Commission to enter into by Executive Order 8771 on June 6, 1941 (*supra,* 12 n.), he authorized the Administrator of the War Shipping Administration, following the outbreak of war, to continue to operate thereunder (Executive Order, No. 9054, of February 7, 1942).*

---

* This Executive Order, as here pertinent, read as follows:

"By virtue of the authority vested in me by the Constitution and Statutes of the United States, including the First War Powers Act, 1941, approved December 18, 1941, as President of the United States and Commander in Chief of the Army and Navy, and in order to insure the most effective utilization of the shipping of the United States for the successful prosecution of the war, it is hereby ordered:

1. That there is established within the office for Emergency Management of the Executive Office of the President a War Shipping Administration under the direction of an Administrator who shall be appointed by and responsible to the President.

2. The Administrator shall perform the following functions and duties:

"(a) Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2) vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.

* * * * *

"3. The functions, duties, and powers conferred by law upon the United States Maritime Commission with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels, and the issuance of warrants with respect thereto, under the Merchant Marine Act of 1936, as amended, 49 Stat. 1985; Public Law 101, Seventy-seventh Congress, approved June 6, 1941, Public Law 173, Seventy-seventh Congress, approved July 14, 1941, are hereby transferred to the Administrator; and such part of existing personnel of the United States Maritime Commission together with such records and public property as the Administrator may deem necessary to the full exercise of his functions and duties prescribed by this Order are hereby assigned to the War Shipping Administration."

In the former Executive Order the President, it will be recalled, had unconditionally "directed" the Maritime Commission, as a matter of duty, not discretion,

> "to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act" (Act of June 6, 1941; *supra,* 13 n.).

And in the later Executive Order (No. 9054, *supra,* 75) that was one of the "duties" thereby "transferred to the Administrator" (*id.,* sec. 3, *supra,* 75).

This later Executive Order thus authorized the continued performance of the requisition charter of the "Antoinetta" in war-time; approved of that transaction of trade with petitioner, an alien enemy, and his property in the Antoinetta,—and not merely authorized but unconditionally required that just compensation be determined and paid to petitioner for such use of his said property.

And that Congress approved of the President's carrying out in war-time the requisition charter of the Antoinetta entered into in peace-time, and sanctioned the Presidential approval thus bestowed upon the transaction of trade with petitioner and his property in that vessel, is made manifest by Congress' subsequently extending the Act of June 6, 1941 (*supra*), to a time six months following the end of the war, in the Joint Resolution of June 16, 1942, c. 416 (56 Stat. 370),* and thereafter amending

* "* * * the provisions of each of the following Acts and resolutions, and all authority thereunder, are hereby continued in full force and effect until six months after the termination of the present war shall have been proclaimed * * *: * * * Public Law 101, Seventy-seventh Congress, approved June 6, 1941; * * * and all authority of the Commission transferred to the Administrator of the War Shipping Administration by the President's Executive Order of February 7, 1942 (numbered 9054; 7 Federal Register 837) shall be performed by such Administrator in conformity with such Executive Order."

it in the Act of March 24, 1943, c. 26, sec. 5 (57 Stat. 49),† both laws expressly referring to and approving of the said Executive Order No. 9054 (*United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152).

It was no mere revocable license, then, under which petitioner's property was being devoted to trade with private citizens; it was a solemn contract authorized by the Congress and availed of by the President, whereunder petitioner's property was being devoted to trade with the sovereign United States itself.

Yet the permission of a mere revocable license under the terms of the Trading with the Enemy Act, would have conferred immunity to capture. How much more so, then, must that same act be understood to confer such immunity upon petitioner's property, covered, as it was, by the permission of an irrevocable license, a contract creative of vested right!

If it be said that the Custodian here found no license, the answer is that the law left him no room for such a finding. The law had inscribed in public view, for all to see, not only the permission of an irrevocable license, but the obligation of a sovereign contract. To undertake a finding to the contrary was but to disobey the law.

Prior authorized and valid agreements of sovereigns to respect and restore private property, always have been construed as rendering such property immune to capture.

In *Thorshaven and its Dependencies*, Edwards 102, in the trial of a libel to condemn, as captured prize, property of Danish enemies, including the property of private

† "* * * the authority conferred upon the United States Maritime Commission by any provision of this Act shall be vested in and exercised by the Administrator of the War Shipping Administration in conformity with the Executive Order of February 7, 1942 (numbered 9054; 7 F. R. 837), as heretofore or hereafter amended."

subjects, the libel was dismissed because it appeared that the property had been originally received by the Crown under an agreement that all private property should be respected, thus rendering it immune to later capture. In passing judgment, Sir W. Scott said (111):

> "I conceive that nothing can be more clear, than that if the capitulation was not disavowed by the British Government, it was binding upon the respective parties: it was a stipulation operating on the Danes to give up all public property, and on the British to respect all private property. Suppose that the English Government, without disavowing the capitulation, had sent a force the next day to take possession of the private property in the island, could there have been a more outrageous breach of public faith?"

In *Simon* v. *Miller* (U.S.D.C., N.Y., S.D.), 298 Fed. 520, Judge Learned Hand has held that the Custodian's power of capture cannot prevail against a previous valid agreement of the United States. There a fund of $350,000 had been deposited by the plaintiff in the American Exchange Bank, in New York City, pursuant to an agreement made between him and the Department of Justice of the United States, which agreement was entered into prior to the appointment of an Alien Property Custodian. It was agreed between the Department of Justice and the plaintiff that the sum should not be withdrawn until the end of the war (first World War), except upon the signature of plaintiff and his counsel, and that no part of it should be paid to an alien enemy named Albert, who was asserting a claim thereto. Subsequently, after an Alien Property Custodian had been appointed, that official determined that Albert was an alien enemy and that the plaintiff owed him consid-

erably more than the said deposit of $350,000 and purported to capture it. The plaintiff thereafter sued the Alien Property Custodian for repayment of the said deposit contending that its capture was unauthorized. Judge Hand, in upholding the contention of the plaintiff and requiring the Custodian to restore the deposit, said (522):

> "The deposit arose because the officials of the Department of Justice wished to impound the plaintiff's assets up to the supposed balance due on the account, and to prevent its payment to Albert. Even if it be true that the deposit in fact created a security for some such official as the Custodian, to be later appointed, still it was consensual in its origin, and the United States had no right to secure its possession by capture."

The promise here given was not gratuitous: It was given by command of the statute itself in consideration of the receipt of full value from the vessel-owner. Receipt of the vessel by the Government constituted full performance of everything to be done thereunder by the petitioner and left performance of the Government's promise of restoration and compensation as the only thing remaining to be done on either side. It was in very truth a deposit received by the Government in peace-time from petitioner; and fulfillment of the former's pledge to return the same with compensation, was required by every consideration of honor as well as of law.

Justice revolts at the idea that the American sovereign,—after it had received the deposit from the private Italian vessel-owner and had plighted the public faith to the return thereof with compensation—should be able either to conceive or to gratify a wish to disown and repudiate that obligation, merely because of subsequent war with the other's sovereign.

Such an agreement—for the benefit of a private alien friend, later become enemy from war with his sovereign—was respected and enforced in the first World War when the German ships at a haven of refuge in the Virgin Islands, were received on the acquisition of those islands in or before January, 1917. The ships were, though war with Germany had meanwhile been declared, excepted from the Joint Resolution of May 12, 1917, authorizing the President

> " to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof * * * which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag or was under register of any such nation or any political subdivision or municipality thereof. * * *"

They were captured neither under that Joint Resolution nor under the Trading with the Enemy Act (*supra*, 10 n.) thereafter adopted October 6, 1917. The reason appears from the debates on passage of the Joint Resolution in the House, where Mr. Webb was in active charge of the bill, and where he gave the following explanation:

> "Mr. Mann: Why is the exception made in the case of the Danish West India Islands, or the American Virgin Islands, as they are now properly called?"
>
> * * * * * * *
>
> "Mr. Webb: I understand that our State Department had a special arrangement with the Danish Government.
>
> "Mr. Mann: What is the special arrangment?

"Mr. Webb: That none of these vessels which were at the Virgin Islands should be confiscated or taken."

55 Cong. Rec. 1903.

After some slight further interchange of remarks, Mr. Webb added:

"My recollection is that the agreement between the United States and Denmark in taking over the Virgin Islands provided that all ships that were then in the harbor should remain the property and in the possession of the then owners. That is why this exception is put in. This was agreed upon by our State Department and the Danish Government."

Id. 1903-1904.

The same kind of an agreement was here entered into between the American and Italian governments with respect to the petitioner's right to restoration and compensation. The State Department of the United States assured that of Italy, both during and subsequent to passage of the Act of June 6, 1941, that for Italian vessels requisitioned thereunder, if not already the property of the United States through forfeiture, their Italian owners would receive just compensation as provided by that Act. Mr. Hull so assured the Italian Ambassador on May 15, 1941, after the then proposed legislation had passed the House, saying:

"The right of a Government to requisition for public use private property within its jurisdiction, whether owned by nationals or by aliens, subject to the payment of just compensation, is well settled. • • • The rule with respect to compensation in these cases is safeguarded not only by the Consti-

tution of the United States but by the proposed legislation. * * *"

U. S. Department of State, file 865.85/649, as set out in Hackworth, *Digest of International Law,* Vol. VII, p. 541.

And, again, on August 21, 1941, after the new law had gone into effect, Mr. Hull telegraphed, through the American Embassy in Rome, to the Italian Government

"that proceedings had been instituted in the courts to determine whether the ships should be forfeited because of violations of the Espionage Act of 1917, *adding that if they were not forfeited on this ground the owners would be paid the value of any vessels requisitioned in accord with the provisions of the act of June 6, 1941.* 55 Stat. 242." (Emphasis supplied.)

U. S. Department of State, file 865.85/578, as reported in Hackworth, *Digest of International Law,* Vol. VII, p. 529.

And, as we have before seen, it was on the very day the Act of June 6, 1941 (*supra,* 6 n.), became law that the President in Executive Order No. 8771 (*supra,* 13 n.) imposed upon the Maritime Commission, not as a matter of discretion, but as one of unconditional obligation, the duty of paying compensation for petitioner's property.

"3. The Commission is directed to determine and make to the owner or owners of any vessel taken in accordance with the provisions hereof, just compensation for such vessel, or the use thereof, in accordance with the provisions of the aforesaid act."

Executive Order No. 8771 (*supra*).

Thus the agreement, obligation and debt of the sovereign United States to compensate petitioner for his property,—at least insofar as he owned it at the time of its requisition—was not only embodied in the Act of June 6, 1941, but repeated and confirmed by the President and the Secretary of State in their official conduct relative thereto. That agreement the Government is now bound to respect. And it leaves no room for capture.

c

Even if the Trading with the Enemy Act did not by necessary implication withhold from the Government any and all power to capture petitioner's property, it should be so construed because such capture was not within the purpose of the legislation.

The purpose of the legislation was to cripple the enemy's power of *waging war* and promote our own (*Miller* v. *United States,* 11 Wall. 268, 306; *Miller* v. *Robertson,* 266 U. S. 243, 248; *United States* v. *Chemical Foundation,* 272 U. S. 1, 9-10); not to inflict a post-war punishment upon enemy citizens (*Sutherland* v. *Mayer,* 271 U. S. 272, 289; *Daimler Co.* v. *Continental Tyre, etc. Co.,* [H. L.], [1916] 2 A. C. 307, 347; *Stevenson and Sons* v. *Aktiengesellschaft, etc.* [H. L.], [1918] A. C. 239, 249, 253, 254).

> " 'The prohibition against doing anything for the benefit of an enemy contemplates his benefit *during the war* and *not* the possible advantage he may gain when peace comes.' " (Emphasis supplied.)
>
> *Sutherland* v. *Mayer, supra* (289).

Here the nature of the contract was such that its entire benefit during the war redounded to the United States; none to the petitioner.

d

Even if the Trading with the Enemy Act did not by necessary implication deny Government any and all power to capture petitioner's property, it should be so construed because to construe it otherwise would be to render it to that extent unconstitutional.

Petitioner's property in the "Antoinetta" at the time of its alleged capture consisted solely in and of the contractual obligation or debt of the sovereign United States to restore to him that vessel in kind or value, with charter-hire for its use in the meantime. That undeniable fact was conceded below.

> "We may concede that whatever interest the claimant had in the 'Antoinetta' was an obligation from the United States to him under the Act of June 6, 1941."
>
> (Brief for Custodian, pp. 11-12.)

To attempt to capture that interest, then, was nothing short of an attempt to repudiate a contractual obligation or debt of the sovereign United States.

> "Public debt has been truly defined, *'A property subsisting in the faith of government'*. To confiscate or sequester it is emphatically to rescind the promise given, to revoke the faith plighted. It is impossible to separate the two ideas of a breach of faith, and the confiscation or sequestration of a property subsisting only in the faith of the government by which it is made."
>
> Hamilton's Works [Lodge ed. 1885], Vol. 5, p. 73, [Letters of Camillus, No. 19].

No such power of repudiation,—no such power "to rescind the promise given, to revoke the faith plighted,"—

reposed in the Executive Department of the Government. Congress had never purported to bestow it (Trading with the Enemy Act, *supra,* 10 n.); Congress constitutionally could not bestow it. The Constitution (Fourteenth Amendment, sec. 4) has declared that

> "The validity of the public debt of the United States * * * shall not be questioned."

As this Court in *Perry* v. *United States,* 294 U. S. 330, in holding the grant of such a power of repudiation to be beyond the ambit of congressional authority, said (352):

> "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments."

And, after citing and quoting from *Lynch* v. *United States,* 292 U. S. 571, 576, 580, and the *Sinking-Fund Cases,* 99 U. S. 700, 719, it added (353):

> "The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. *But the right to make binding obligations is a competence attaching to sovereignty.* In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm* v. *Georgia,* 2 Dall. 419, 471; *Penhallow* v. *Doane's Administrators,* 3 Dall. 54, 93; *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 405; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. *The Congress cannot invoke the sovereign*

> *power of the people to override their will as thus declared.*" (Emphasis supplied.)

Among the other authorities relied on by this Court, in the foregoing exposition of constitutional doctrine, was the opinion of Alexander Hamilton, communicated to the United States Senate under date of January 20, 1795, (Hamilton's Works, [Lodge ed. 1885], Vol. 3, p. 29), from which this Court quoted as follows (352 n.):

> "'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. *Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it.*'" (Emphasis supplied.)

When Congress, "as the instrumentality of sovereignty", once authorizes a promise for value received, it thereafter "cannot invoke the sovereign power of the people" to break that promise. All its power to legislate in respect to such promise is exhausted "unless in aid of" it.

The Constitution (Fourteenth Amendment, sec. 4), in commanding that the validity of the public debt shall not be questioned has thus but expressed what it otherwise would necessarily imply. In recognition of that truth in *Perry* v. *United States, supra,* this Court said (354):

> "The Fourteenth Amendment, in its fourth section, explicitly declares: 'The validity of the public

> debt of the United States, authorized by law, • • • shall not be questioned.' While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as *confirmatory of a fundamental principle,* which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. *Nor can we perceive any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations.*
>
> "We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." (Emphasis supplied.)

Below, counsel for the Custodian argued that the foregoing views represented the opinion of a minority of the members of this Court and therefore deprived them of the authoritative effect they otherwise must have. But a glance at the report of the case shows otherwise.

That shows that all of the foregoing views commanded the support of at least eight of the Justices. For, in agreement were those Justices who dissented from the majority holding on another and entirely unrelated and narrower ground, viz., that relating to proof of damages (*Id.,* 379-380; *Machen* v. *United States* [C. C. A., 4th Cir.], 87 F. 2d 594, 596, 598).

Counsel for the Custodian also sought below to escape the effect of this Court's decision in *Perry* v. *United States, supra,*—viz., that Congress was without constitutional power to authorize repudiation of the sovereign contractual obligations of the United States incurred for

value received—by arguing that the Court of Claims in *North German Lloyd* v. *United States,* 61 Ct. Cl. 138, cert. den. 270 U. S. 645, had sanctioned repudiation by the Executive Department of a contractual obligation to an alien enemy authorized by the Act of Congress of March 28, 1918 (40 Stat. 459). The argument was that by that statute Congress had authorized, in the midst of the first World War, the taking of an alien enemy's dock property in Hoboken, New Jersey, and the payment to said alien enemy of just compensation therefor; and that the Executive Department, in refusing to pay just compensation after taking over the said property, had been upheld by the Court of Claims.

But a slight consideration of the terms of the statute* and the facts involved shows the fallacy of that argument. The facts were that a New Jersey corporation, an American citizen, owned the fee in the property; the alien enemy, a 999-year leasehold therein. The statute, in providing for the taking and the payment of just compensation, referred only to the American citizen and its interest in the property, making no reference to the alien enemy's leasehold interest therein. Accordingly, the only contract authorized by Congress was with the American citizen; and that contract, the Executive Department carried out. The Executive Department, in taking over the American citizen's property, also at the same time took over the alien enemy's leasehold. But that taking raised no contract by implication, since it was the property of an alien enemy, captured in time

* "The President is authorized to acquire the title to the docks * * * now *owned* by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, *two corporations of the State of New Jersey* * * * If any *such* property shall be taken as aforesaid, the United States shall make just compensation therefor * * *" (Emphasis supplied.)

of war. Hence, the Court of Claims, in denying the alien enemy's claim to just compensation, was upholding the repudiation of no contract of the United States, either express or implied.

Counsel for the Custodian also argued that in certain instances in the first World War, the Custodian had captured United States Government bonds. But such bonds, it appeared and was not denied by counsel, were merely the corpus of trust or other funds in the hands of local holding agents, which were being held for the account and benefit of alien enemies. The private obligations, debts, or engagements of the local holding agents to the alien enemies were of course capturable, and the mere fact that their subject-matter was Government bonds did not make them any less so; any more than would have been the case if the subject matter had been greenbacks, silver certificates, or gold notes. The obligation captured was the private obligation to the alien enemy to hold for his account or deliver to him promises of the United States. There was no capture or repudiation of a promise or contract of the United States already delivered to or made with an alien enemy.

Involved here, is no capture or attempt to capture a private debt or obligation of an American citizen owing to petitioner. The only obligation and debt here involved is that of the sovereign United States, owing directly to petitioner in consideration of a deposit received from him in time of peace under an unconditional, valid, and binding contract, authorized by the Congress; a contract to restore his deposit in kind or value, with hire for its use in the meantime. And it was beyond the power of the Congress, once that contract had been so made,—

come war, come peace,—to authorize its capture, its dishonor, or its repudiation.

Since that is so, even did the language and the purpose of the Trading with the Enemy Act admit of a construction permitting the implication of such an authority, that construction could not properly be adopted. For, as this Court has said:

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. R. Co.* v. *Boone*, 270 U. S. 466, 472; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346." (Emphasis supplied.)
>
> *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 30.

e

Even if the Trading with the Enemy Act did not by necessary implication deny to Government any and all power to capture petitioner's property, it should be so construed because such construction is in keeping with the law of nations.

Another equally well-settled rule of construction in respect to Federal statutes is that, in the absence of provisions clearly indicating an unwillingness further to subscribe to and abide by those rules of international law which have gained general recognition and acceptance among the nations of the earth, the statutes are to be construed in the light of and in conformity to those rules.

This Court in *The Charming Betsy,* 2 Cranch 64, 118, by Marshall, C. J., declared that

> "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains * * *."

And in *The Paquete Habana,* 175 U. S. 677, where fishing vessels were held to be exempt from capture, this Court said (700):

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot,* 159 U. S. 113, 163, 164, 214, 215."

In the same connection, this Court quotes from Chancellor Kent as follows (*id.,* 701):

> "Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and

> no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.' 1 Kent Com. 18."

If there is one principle of the law of nations upon which the authorities are in unanimous agreement, it is the proposition that public debts owed to an enemy, as distinguished from private debts, are not subject to sequestration or confiscation. Professor John Bassett Moore, in his Digest of International Law, Volume VII, pp. 306, 307-308, says:

> "By the testimony of publicists and the practice of nations, the principle is established that the obligation of a state for the payment of its debts is not affected by war even though such debts be held by citizens or subjects of the enemy. * * *"
>
> "With the law of the present day as to private debts, we are not concerned; but, as to the law touching public debts, the current of opinion is unvarying. Vattel, writing in the last century, declared: 'The state *does not so much as touch the sums which it owes to the enemy:* money lent to the public is everywhere exempt from confiscation and seizure.'
>
> "This principle, says Phillimore, 'is one which now may happily be said to have no gainsayers.'
>
> "The act of the King of Prussia, in 1752, in stopping, as an act of reprisal, the payment of interest due by him to English creditors on the Silesian loan is conspicuous not more by reason of its solitariness than by reason of the unanimity with which publicists have disapproved it. The payment of the interest was in fact resumed, but, while the question was still pending, the King of Prussia presented in justification of his course a memorial. To this memorial a famous answer was prepared for the British Government by Sir George

Lee, judge of the prerogative court; Dr. Paul, the advocate-general; Sir Dudley Ryder, and Mr. Murray, afterward Lord Mansfield. In this answer there is the following passage:

"'It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to a private man. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because a prince can not be compelled, like other men, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.'"

The learned publicist continues:

"Vattel described the British answer as 'an excellent bit of the law of nations' (un excellent morceau de droit des gens), while Montesquieu pronounced it 'an answer without a rejoinder' (une résponse sans réplique). It is commended by Twiss, by Calvo, and generally by other publicists.

"Says Pradier-Fodéré: 'States can not confiscate to their profit that which they ought themselves to pay to subjects of the enemy, as by seizing the rents of the public debt. How, indeed, can it be admitted that a state may deprive of their due individuals who, under the guarantee of the law and the public faith, have confided to it their capital.'

"Fiore asserts the same principle in almost the same words, and adds: 'All that we could excuse in case of extreme necessity would be the suspension of payments during the war when the want of money rendered that measure indispensable and

> when the state would have no other means less ruinous of providing for the urgent necessity of the war. But even that expedient, which may be excusable if the Government afterwards makes the payments, which were postponed, at the conclusion of peace, would always be disastrous, because it would undermine the base of the economic life of the state—the public credit.' "

Westlake, in discussing the same matter in his work on International Law, (2nd ed. 1913), Vol. 2, Part 2, War, ch. 2, pp. 41-42, says:

> "Neither the principal nor the interest of a state debt can be confiscated or sequestrated because the individuals to whom it is due are enemy subjects."

Hyde, in his treatise on International Law, (1922), Vol. II, sec. 623, p. 241, comments upon the principle as follows:

> "The indebtedness of a State possesses a special quality of indestructibility due to the circumstance that cancellation or sequestration by the debtor would amount to a breach of good faith, and hence a stain upon its own national honor."

And Wildman, in his Institutes of International Law, Vol. II, pp. 10, 11, emphasizes the vast distinction between private and public debts in respect to a government's right of confiscation, saying:

> "The right to confiscate private debts due to an enemy, was laid down by the Supreme Court of the United States in accordance with the opinion of Grotius and Bynkershoek, and was held not to be distinguishable from the right to confiscate corporeal property, since they are respectively contracted and acquired under the faith of the same

> laws. * * * *But public debts due to private persons are not confiscable.* It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done."

Birkenhead on International Law (6th ed.) 196, says:

> "The rule as to the suspension of contractual relations during a war does not enable a State to repudiate its obligations to enemy subjects in respect to state debts."

And, after referring to the action of Frederick the Great in withholding payment of the interest upon the Silesian loan, the same learned jurist adds that

> "opinions of the operation were so unanimously adverse that the inviolability of the claim of a State's creditor has been treated ever since as beyond dispute."

Scott, in his Collection of Cases on International Law, (1906), sec. 132, p. li, says:

> "Debts of a State due to the Enemy and the Interest thereon are not confiscable."

Taylor on International Public Law, p. 442, treats the subject as follows:

> "A public debt not the subject of reprisal.—A public debt is not the subject of reprisal; it is inviolable, and interest cannot be stopped on it as a means of redress. Frederick II threatened, in 1753, as retaliation for seizure by England of Prussian ships engaged in prohibited trade, to confiscate English interests in a Silesian loan which he had guaranteed; and in opposition to this was presented

> with an admirable memorial of English jurists, penned principally by Murray, afterwards Lord Mansfield. * * * It is now generally conceded, as a matter of policy, if not of principle, that a public debt is secure against reprisals in peace and war."

Woolsey, in his admirable treatise on International Law, (6th ed.), discussing the same rule, observes (198):

> "Finally, as to public debts due to individual subjects of the enemy, * * * 'one description of property is invariably respected during war, namely, the sums due from the state to the enemy'. * * *"

Vattel, treating of the same subject, in his Law of Nations, Book 3, ch. 5, sec. 77, says, as pointed out by Professor Moore, *supra,* that "the State does not even touch debts which it owes to the enemy."

Von Martens' "Precis du droit des Gens" (William Cobbett translation, June, 1802), Book VIII, ch. II, sec. 5, says:

> "Generally speaking, a nation *does not venture to touch* the capitals which the subjects of the enemy may have in its funds, *or that it may otherwise owe to such subjects.*" (Emphasis supplied.)

Twiss, in his Law of Nations, Part 2, "In Time of War," sec. 58, discussing the same rule, observes (112):

> "It is obvious that it would be contrary to natural justice for a State to reap the benefit of a loan, of which it retains possession, and at the same time to refuse to pay the equivalent for that benefit, which it pledged its faith to pay when it accepted the benefit. It is not like the case in which a State has undertaken to grant a favor to the subject of a friendly power, the continued enjoyment of which

> may be reasonably taken to be conditional on the continuance of friendship between the two States."

And Hamilton, speaking of the reply of the English to Frederick II on the Silesian guaranty, said (Works, [Lodge Ed. 1885], Vol. 5, p. 91, [Letters of Camillus, No. 20]:

> "The universal obligation of good faith is here reinforced on a special ground, by the *point of honor;* to confirm the position that money which a sovereign or state owes to private men, is not a proper object of reprisals."

Other distinguished and honored publicists affirming the inviolability of the debts of a state owing to the subjects of an enemy power are Balthazar Ayala, "Three Books on the Law of War," etc., (John Pauley Bate, tr., 1912), Vol. II, Book I, Ch. V, secs. 41, 42, 43, pp. 52, 53; Ch. VI, sec. 1, p. 55; M. Charles Calvo, "Le Droit International," (3rd ed.), Vol. III, Part II, Book VI, sec. 1978, p. 242; Phillimore, "International Law" (2nd ed.), III, pp. 34, 148; Hall, "International Law," (8th ed., 1924), sec. 144, pp. 521, 525; Halleck, "International Law," (1878 ed.), Vol. 2, ch. 21, sec. 8, pp. 102-103; Pradier-Fodéré, "Traité de Droit International Public" (1894), VI, p. 740; and Fiore, "Nouveau Droit International Public" (1886), III, 226, sec. 1392.

In the absence of any expression to the contrary, the Trading with the Enemy Act (*supra*) must be construed in line with this long and firmly established principle of the law of nations (*The Charming Betsy, supra*).

Below, the Custodian's counsel argued that the foregoing principle of the law of nations applied only to a sovereign's promises to repay money lent to him, not to his promises to return other deposits received by him, such as vessels, or to pay money for goods or services

supplied. Not only is there no authority for such a novel distinction, but it is altogether wanting in logic. The same reasons that condemn repudiation in the one case, condemn it equally in the other. In both the sovereign's honor is involved; in both the public faith is plighted; and in both the sovereign has received the valuable consideration that supports the promise. As well argue that the Fifth Amendment raises an obligation of the sovereign to pay for *money* exacted for public purposes, but not for *other* forms of capital taken to the same national use; or that an individual's promise to repay a loan is of a higher and more compelling character than his promise to pay for goods or services purchased.

An argument, similar to that of the Custodian's counsel, was addressed to, but emphatically rejected by, this Court in *The Banks* v. *The Mayor,* 7 Wall. 16. The contention there advanced was that, while a State could not lawfully tax the United States' promises to repay money borrowed by it, it nevertheless had the right to tax the National Government's promises to pay for any other form of property or services received by it. In denying the validity of that argument, this Court said (24):

> "An attempt was made at bar to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their

> demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money."

Of course in olden times when the activities of Governments were much more limited in scope than now, their promises for value received were generally met with only in connection with their borrowing of moneys. And publicists, in referring to sovereign contracts, seldom had occasion to speak of other kinds of promises. But they never, so far as can be discerned from their writings, purported to draw the distinction argued by counsel.

On the contrary, von Martens, the only publicist of note, the Custodian's counsel cited below, denied the existence of any such distinction, saying that the principle of non-violability of a sovereign's debts, applies not only to investments "in its funds," but as well to whatever "it may otherwise owe" (*supra,* 96).

And this Court, in *Perry* v. *United States, supra,* in construing section 4 of the Fourteenth Amendment, providing that "the validity of the public debt of the United States • • • shall not be questioned," said that it could perceive no reason

> "for not considering the expression 'the validity of the public debt' *as embracing whatever concerns the integrity of the public obligations*" (*supra,* 87).

Clearly the contract of the United States to restore petitioner's vessel capital in kind or value with hire for its use, is just as non-violable as would be its promise to repay his money capital, if taken, with hire for *its* use.

f

Petitioner's property could in no event be captured until found, and found capturable as enemy property; and such finding was never made.

Exercise of the Custodian's power of capture at best was conditioned on a preliminary finding by him of property that was capturable as enemy property. Thus section 7(c) of the Trading with the Enemy Act (*supra,* 10 n.) limited his power of capture to property that he "after investigation shall determine is so owing, or so belongs or is so held"; that is, "owing or belonging to or held for, by or on account of, or on behalf of, or for the benefit of an enemy." (*Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.* (D. C. S. D. N. Y.), 17 F. 2d 174, 175, 178.)

And section 10 of Executive Order No. 9095, as amended by Executive Order No. 9193 of July 6, 1942 (*supra,* 12 n.), pronounced such finding to be the "final and conclusive" test of his power of capture.

> "For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof *is* the property or interest of a designated *enemy* country or national thereof shall be *final and conclusive* as to the *power* of the Alien Property Custodian *to exercise any* of the power or authority conferred upon me by section 5(b) of the Trading with the Enemy Act, as amended." (Emphasis supplied.)

Here no such finding or determination was ever made by the Custodian. His vesting order (R. 30a) expressly disavowed any finding or claim that any property interest in the "Antoinetta" was in fact enemy property. The

furthest it went in that direction was to assert that, *if* a particular enemy (petitioner) *had* any interest therein, that hypothetical interest was enemy property (R. 28a). Whether the enemy *did* have any such interest in the vessel, the Custodian left it to the courts and to the courts alone to determine. At least, then, until the courts had determined that such hypothetical interest had some reality, his power to capture it was nill.

In *Stoehr* v. *Wallace, supra,* this Court decided that, for the purpose of capture, the prior determination that property *is* affected with an enemy interest, may be made by the Custodian, as well as by the President. Thereby this Court implicitly decided that it *must* be made *before* the power of capture can be exercised. For, if such prior determination was not prerequisite to exercise of the power, it was wholly bootless to decide who might make it.

Citing and following *Stoehr* v. *Wallace, supra,* the Southern District Court in New York, in *Hunter* v. *Central Union Trust Co., supra,* held a vesting order that was in all essential respects like that here relied on by the Custodian—that is, one based on the hypothesis that enemies *might possibly* have an interest in certain property *not* on a *finding* that they *did* have (175)—to be wholly invalid as a capture, or basis of capture of anything. Said District Judge Goddard (178):

> "before such a seizure takes place, there must be an administrative determination that certain specific property is owned by or held for the benefit of a person or firm who is determined to be an enemy or ally of an enemy. I think it is clear, from the statutes and from the cases construing them, that such determinations are prerequisites to the seizure whether the seizure be actual or symbolical.
>
> "The direction to the trust company in the alleged demand to turn over the stock 'in so far and to the extent that the said deposited securities were

> * * * held by, on behalf of, for the benefit of, or for the account of' " (enemies) "was not a determination, for the very things that should have been determined by the Alien Property Custodian were left undetermined, namely that certain specific property was owned by a person or firm who was determined to be an enemy. * * * Of course, a determination that the securities are enemy-owned to the extent that they are enemy-owned is merely going around a circle, and is no determination at all."

There the Custodian had left it to the Trust Company to determine "on presentation of the certificates whether or not they were owned by an enemy". As to that, the District Judge added (178):

> "If there was any determination, it would fall upon the trust company, and that would be a delegation of the power by the Alien Property Custodian, which he had no right to delegate."

Here the attempted delegation of power to make the determination whether the "Antoinetta" was enemy-owned, was to the courts, not a trust company. But, it seems plain that such delegation of power was quite as much beyond the Custodian's authority in the one case as in the other.

If it be said that the Custodian here could make no determination without extinguishing the Government's claim of title by forfeiture, that is but one good reason why he should not have tried to capture for enemy ownership what was already claimed as forfeited for crime; not a valid reason for his attempting an exercise of power never conferred on him by law.

THIRD POINT

Even if petitioner was without any property interest in the "Antoinetta" after the alleged capture, he nevertheless did still possess a defensible interest in the outcome of the litigation, and to deny him, as did the lower courts, the right to continue to defend that interest against the libel was a denial of the due process guaranteed him by the law.

The first and second points *supra* have undertaken to expose the essential fallacy of what constituted the minor premise of the lower courts' reasoning, viz., that the District Court *could validly* determine *without a trial* and *had validly* so determined that petitioner had no title to defend (*supra,* 49, 63).

The third point now addresses itself to the task of showing also fallacious the major premise of that judicial reasoning, viz., that petitioner's right to maintain his defense of title against the libellant's asserted forfeiture title did not survive a valid determination that he had no title to defend (*supra,* 49, 52, 63).

To have been sound, that major premise should have been limited to the event of a valid determination, (1) that petitioner had no title to defend at and since a time prior to the "Antoinetta's" seizure for forfeiture; and (2) that, whenever his title had been lost, such loss had carried with it a loss of every benefit that, by reason of such past ownership, would otherwise inure to him through defeat of the asserted forfeiture title.

a

Petitioner's ownership of the "Antoinetta" though past, entitled him to defend against the libel.

If the seizure of the "Antoinetta" was tortious, and he at the time thereof was owner of the vessel, it was his property right that was invaded, and it was he that was entitled to seek redress therefor against the tort-feasor, the Collector. That interest was not an interest in the vessel, not a right *in rem,* but a personal right inuring to him against the offender; and, therefore, was not a right of the kind the Custodian purported to capture.

But nowhere could it be determined that the seizure was or was not tortious, save in the trial of the asserted forfeiture title. For

> "that decree" (in the forfeiture suit) "can alone decide, whether the taking be rightful or tortious."
>
> *Gelston* v. *Hoyt,* 3 Wheat. 246, 314.

> "The first question is, whether there was a justifiable cause of seizure? This question has been already decided in the proceedings *in rem* (forfeiture suit), "and the decree of acquittal not having been appealed from with effect, is conclusive evidence in every inquiry before every other tribunal, that there was no such cause. This point was decided upon great consideration, in the case of *Gelston* v. *Hoyt* (3 Wheat. 246), and is not believed to be susceptible of any legal doubt."
>
> *The Apollon,* 9 Wheat. 362, 367.

If the final decree in the forfeiture suit against the "Antoinetta" dismisses the libel and the District Court enters no certificate of cause (R. S. 970, *supra,* 30 n.), the right of petitioner to maintain his action against the

Collector for an unlawful seizure will thereby be conclusively secured; otherwise, conclusively lost. As this Court said in *Gelston* v. *Hoyt, supra,* 314:

> "if the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then, in the former case, by the general law, and in the latter case, by the special enactment of the statute of the 25th of April 1810, ch. 64, sec. 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal, and a denial of such certificate, then the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury."

Hence it is, that in a forfeiture suit it is the owner as of time of seizure that is entitled to defend, even in preference to a successor in interest for valuable consideration (*United States* v. *422 Casks of Wine,* 1 Pet. 547, 549-550). The former's only means of avoiding loss lies in defeat of that suit; the latter still has his warranty of title to rely upon.

The rule thus applicable here is, in result, not different from that observable in equity, where, as Story says: If the assignment *pendente lite* be disputed, the alleged assignor is *always* a necessary party (Story's Equity Pleading, 10th Ed., 160-161); whereas, even though such assignment be not challenged, the assignee *pendente lite* is *never* a necessary party (*id.,* 163).

The District Court thought *United States* v. *422 Casks of Wine, supra,* not controlling as an authority, because this Court there, after considering and deciding the point discussed *supra,* had gone on to point out that, in any event, the successor in interest *pendente lite* in that case was not objecting to defense by the owner of the *res* as

of time of seizure, and that such want of objection was enough to overcome that of the libellant (R. 50a-51a). In so thinking, the District Court erred. The decision of one considered point raised by the record and presented in argument does not become mere dictum by the subsequent revelation of another point whose decision in itself alone would have been sufficient to dispose of the controversy (*Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160, 166; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486).

b

Petitioner's interest in preserving the trusteeship of the Government for the benefit of his American creditors, entitled him to defend against the libel.

If the libel be defeated, then by virtue of section 9(a) of the Trading with the Enemy Act (*supra*, 11 n.), even though the alleged capture of petitioner's property, on July 22, 1942, be deemed valid, the Government remains the trustee thereof for the benefit of petitioner's American creditors (*White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301; *Markham* v. *Cabell* [U. S. Sup. Ct.], Adv. Op. No. 76, December 14, 1945); and from their claims, to the extent so satisfied, petitioner becomes forever free.

But, if the libel prevail, the benefit of that trusteeship is lost, and petitioner's American creditors must look for satisfaction of their claims to him and his European assets.

His liability over, thus dependent on the fate of the property he at least once owned, clothes petitioner with a right of defense that is unassailable (*The Beaconsfield*, 158 U. S. 303, 307; *Pendleton* v. *Benner Line*, 246 U. S. 353, 356; *The Kaiser Wilhelm II* [C.C.A. 3rd Cir.],

246 Fed. 786, 789; *Queenan* v. *Mays* [C.C.A. 10th Cir.], 90 F. 2d 525, 534-535; *Chipman* v. *City of Hartford*, 21 Conn. 488, 498); and particularly so when his would-be substitute is or may be possessed of an interest to lose, not win, the defense (*The Regina del Mare*, Br. & L. 315, 316; *Ward* v. *Brandt*, IX Mart. [La.] O. S. 625, 630-631).

In *The Regina del Mare, supra*, Dr. Lushington permitted a vessel's underwriters, rather than her owners, to defend a vessel in an *in rem* action in admiralty for breach of a contract of carriage whose performance had been prevented by accident at sea. He did so, because, as was claimed, if the defense failed the owners would gain an indisputable right to the abandonment to underwriters they theretofore had been unsuccessfully seeking to effect, and were, therefore, interested in losing the suit, whereas the underwriters for the same reason were interested in winning it. Counsel for underwriters argued (315-316):

> "The affidavits show that the insurance companies have an interest to defend this suit, and that the owners have an interest not to defend it. Justice seems to require that these insurers should be admitted to defend. If they are not allowed to come in and protect their interest, the Court may practically lend its assistance to the accomplishment of a fraud."

In sustaining that contention, Dr. Lushington observed that, while by the ancient practice of the Court of Admiralty the owners alone had the right to defend,

> "it was always in the power of the Court to accommodate the practice to the justice of the case."

Here it cannot be gainsaid that the Custodian has good reason for wishing to lose the defense whose conduct he

seeks alone to assume. If it be lost, the Government, whose agent he is, can never be charged with the duty of holding petitioner's property in trusteeship for the benefit of his American and other non-enemy creditors, but would receive and hold that property without any accompanying obligation whatever.

The situation obtaining here is in all essential respects like that passed upon in *Ward* v. *Brandt, supra,* where, on appeal from an order obtained by certain creditors for a forced surrender and sequestration of the assets of a firm of merchants in allegedly failing circumstances, it was shown, with the consent of all parties, that in the meantime other creditors had procured the appointment of syndics who by Louisiana law had thereby succeeded to all of appellants' assets and who by reason of that fact now sought an order substituting them for appellants and permitting them thus to conduct the appeal they were desirous of losing. The Court, in denying that motion, said (630-631):

> "It would be incorrect, I think, to hold, that a case which we are bound to presume the defendants are obstinately disputing below, should, during the pendency of it, be used as a means to prevent them resisting a similar attempt here; and nothing but the most positive law could justify the Court permitting persons to be made parties, who have an interest to lose the suit, they wish to be allowed to carry on."

Those considerations are at least equally apposite here; and for its complete disregard thereof, if for nothing else, the decree affirmed below calls for this Court's disapprobation and reversal.

FOURTH POINT

The loss of the District Court's jurisdiction, if any, over the forfeiture suit, that must inevitably follow the alleged captor's substitution as claimant in place of Petitioner, is sufficient in itself to condemn that substitution.

The Custodian, to the whole extent of his capacity to act as such, is but the Government itself (*Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603; *Becker Co.* v. *Cummings*, 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118). Hence, to substitute him in place of petitioner as claimant to defend against the libel, is but to permit libellant to defend against, as well as to prosecute, its own libel—to conduct both sides of one and the same litigation.

But, since there can be no judicial controversy in the absence of adverse interests, such substitution, as soon as made, must wholly destroy the District Court's jurisdiction over the forfeiture suit, at least insofar as it concerns the property interest defended by the Custodian (*Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 66 U. S. 419; *Wood-Paper Co.* v. *Heft*, 8 Wall. 333; *Globe & Rutgers Fire Ins. Co.* v. *Hines* [C.C.A., 2d Cir.], 273 Fed. 774, 777, 778).

The petition demanding that relief was, therefore, nothing in effect but a motion for an order destroying the District Court's own jurisdictional power over the controversy; a motion that the Court not merely do a vain act, but an act disentitling it to act at all. And that was in itself sufficient to condemn the petition and the order granting it (*Phelps* v. *Oaks*, 117 U. S. 236, 240; *Drake* v. *Goodridge*, 6 Blatchf. 151, 7 Fed. Cas. 1050, Case

No. 4062; *Hirshfeld* v. *Bopp,* 5 App. Div. [N. Y.] 202). Rule 19 [b] of the Federal Rules of Civil Procedure but recognizes and declares the general rule.

The Circuit Court of Appeals, however, felt that the decree destroyed the jurisdictional power of the District Court over the cause only insofar as it concerned the general owner's interest in the *res;* that it did not destroy that Court's power to decree forfeit the lien interest of any third person therein; and that, therefore, it was within the Court's province to grant it (R.). That conclusion is a *non-sequitur,* even were the premise a sound one. Retention of jurisdictional power over one controversy cannot logically justify a Court's destroying its jurisdictional power over another.

Moreover the premise is not sound. The Act of June 15, 1917, Title II, sec. 3 (*supra,* 4 n.), relied on as authorizing the forfeiture, required the forfeiture of the ship, not of particular interests therein; and least of all of only those third-person interests therein which were presumably innocent.

To decree the forfeiture of those interests in the *res* and not of the general owner's interest therein, would be in effect nothing less than to grant a remission of the penalty against the only interest charged with an offense, and thus to violate the Act of June 17, 1930, c. 497, Title IV, secs. 616-618 (*supra,* 32 n.), forbidding such remission save by the Secretary of the Treasury after finding the absence of the very criminality that the libel charged and that the Court must find in order to decree forfeit the interests of the third-party lienors.

In depriving the District Court of jurisdiction to decree forfeiture of petitioner's interest in the *res,* the decree affirmed below deprived it of jurisdiction to decree the forfeiture of any interests therein.

FIFTH POINT

The District Court never did acquire jurisdiction over the cause of forfeiture; and, if it did, lost the same on libellant's availing itself of the remedy of requisition under the Idle Foreign Vessels Act, and removing the *res* from the District Court's custody and control.

a

The District Court never did acquire jurisdiction over the forfeiture cause.

To have acquired such it was at best necessary that the libel allege a statute authorizing a forfeiture (*United States* v. *Hudson,* 7 Cranch 32, 33; *Brown* v. *United States,* 8 Cranch 110, 123; *United States* v. *Charles D. Kaier Co.* [C.C.A. 3rd Cir.], 61 F. 2d 160, 162) and the offence made the ground of that forfeiture by that or some other statute (*The Samuel,* 1 Wheat. 9).

1. The libel here alleged neither. For it alleged, as the statute authorizing the forfeiture, sec. 3 of the Act of June 15, 1917 (*supra,* 4 n.), which was without force or effect at the pertinent time (*Marchese* v. *United States* [C.C.A. 5th Cir.], 126 F. 2d 671, 673; *Giugni* v. *United States* [C.C.A. 1st Cir.], 127 F. 2d 786, 789; *Scaleggeri* v. *United States* [C.C.A. 3rd Cir.], 126 F. 2d 1023; *Polonio* v. *United States* [C.C.A. 9th Cir.], 131 F. 2d 679, 681.

> "Section 3 of Title II penalizes the wilful causing or permitting by an owner, master or member of a

> crew of a vessel, foreign or domestic, of the injury or destruction of the vessel, or permitting its use for named purposes; but the preceding and following sections show that Title II is applicable only after a proclamation of national emergency, and no proclamation is alleged or had in fact been made in March, 1941, except as the proclamation of limited emergency of September 8, 1939, 54 Stat. 2643, and the enlargement of it on June 27, 1940, 54 Stat. 2711, put into some effect Sec. 1 of Title II.* Section 4, 50 U. S. C. A. sec. 194 declares that the President may employ the land and naval forces to carry out the purpose of the Title, indicating that emergency pervades the whole Title. Therfore the whole of Title II was properly placed in Title 50 of the United States Code Annotated, along with our other war legislation, rather than in Title 18, where ordinary crimes are treated."

Marchese v. *United States, supra,* 673.

The Circuit Court of Appeals below had once so held in *Scaleggeri* v. *United States, supra,* in adopting the "reasoning" and the "conclusions" of the Fifth Circuit Court in *Marchese* v. *United States, supra.* But here it reversed the position it had thus previously assumed and chose to follow a District Court decision to the contrary (*United States* v. *The Pietro Campanella,* 44 F. Supp. 348, 351-352).

In thus reversing its former position it held (1) that the operation of section 3 was not confined to time of war or similar emergency; and (2) that, if it was, it had been brought into effect by the emergencies declared by the

---

* The part of this sentence starting with the word "except" appears as a footnote in the opinion.

President in the Executive Orders No. 2352* and No. 2412† of September 8, 1939 (4 F. R. 3851), and June 28, 1940 (5 F. R. 2419) respectively (R.).

But an examination of the statute and the orders referred to shows that reasoning to be unsustainable. For, as to the first ground, section 4 of Title II of the Act of June 15, 1917 (*supra*, 4 n.), provides that

> "The President may employ such part of the land and naval forces of the United States as he may deem necessary to carry out the purpose of this chapter."

And it is scarcely conceivable that Congress should have conferred upon the President the power to employ the army and navy in the enforcement of a criminal law

---

* Executive Order, No. 2352, of Sept. 8, 1939, proclaimed, as here pertinent, reads as follows:

"Whereas measures required at this time call for the exercise of only a *limited* number of the powers granted in a national emergency:

Now, therefore, I * * * do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense *within the limits of peace-time authorizations. Specific directions will be given from time to time for carrying out these two purposes.*" (Emphasis supplied.)

† Executive Order, No. 2412, of June 28, 1940, after referring to Executice Order, No. 2352 of September 8, 1939, *supra*, and declaring that the "continuation" of the conditions therein described now called for additional measures "within the limits of peace-time authorizations,"—and after referring alone to, and *quoting* alone sec. 1 of Title II of the Act of June 15, 1917 (40 Stat. 220),—continued as follows:

"And, whereas, It is essential, in order to carry into effect the provisions of said Act *which are quoted herein*, that the powers conferred *therein* upon the President, the Secretary of the Treasury and the Governor of the Panama Canal be at this time exercised, with respect to foreign and domestic vessels.

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, by virtue of the powers conferred upon me by the provisions of the said Act of Congress quoted herein, do hereby declare the *continuation* of the conditions set forth in my proclamation of September 8, 1939, and the existence of a national emergency by reason of threatened disturbance of the international relations of the United States.

"And, I therefore *consent* to the *exercise*, with respect to foreign and domestic vessels *by the Secretary of the Treasury* and the Governor of the Panama Canal, of all the powers conferred by the provisions of said Act." (Emphasis supplied.)

effective in time of peace (*Marchese* v. *United States, supra*).

And, as to the second ground, viz., that the Executive Orders of September 8, 1939, *supra,* and June 28, 1940, *supra,* had brought section 3 into operative force and effect, an examination of those orders shows that they were expressly confined to other purposes and other provisions of the statute. Executive Order No. 2352, expressing a need "for the exercise of only a limited number" of emergency powers "within the limits of peace-time authorizations", was avowedly but a general recognition of the existence of emergency in connection with the maintenance of neutrality and the strengthening of national defense, coupled with a promise that "specific directions" as to particular steps to be taken to meet such emergency would, in the future, be "given from time to time".

And Executive Order No. 2412 but constituted the first of the "specific directions" so promised, viz., that the President consented to the exercise by the Secretary of the Treasury, "within the limits of peace-time authorizations", of the powers conditionally conferred upon him by sec. 1 of Title II of the Act of June 15, 1917 (*supra,* 3 n.). The only powers conferred upon the Secretary of the Treasury by Title II, were those set forth in its section 1. And the only penalties provided by Title II for interference with the exercise of those powers, were those described in its section 2 (*supra,* 3 n.).

Thus Executive Order No. 2412 gave a specific direction for the exercise by the Secretary of the Treasury of the powers enumerated in section 1; and that impliedly invoked the penalties for interference therewith, as provided by section 2. But the order nowhere either expressly or by implication referred to or called into operative force or

effect the sanctions of section 3, with whose enforcement the powers of the Secretary of the Treasury defined in section 1 had nothing whatever to do. On the contrary, the order made operative only the provisions "which are quoted herein"; and the provisions of sec. 1 only were quoted, not those of sec. 3.

The lower courts, in ruling to the contrary and making the provisions of sec. 3 operative, were in effect usurping the functions of the President and themselves giving an *ex post facto* "specific direction" as to section 3 that he at the time had neither deemed necessary nor given.

2. But if section 3 had been in operative force at the time mentioned in the libel, viz., March 30, 1941, it still would confer no jurisdictional power upon the District Court to decree the forfeiture of the "Antoinetta," unless the libel charged her with the offence the statute made a ground of forfeiture. That, the libel did not purport to do.

It is true that the libel charged her owner, officers and crew with having wilfully caused or permitted her destruction or injury and with having knowingly *permitted* her to be used as a place of resort for persons conspiring or preparing to commit offences against the United States and in violation of the rights and obligations of the United States under the law of nations and in fraud of the United States. But neither such causing or permitting her destruction or injury nor such permitting her to be so used, was by the statute made a ground of forfeiture. They did, it is true, subject those who were guilty thereof to personal penalties of fine and imprisonment; but they did not subject the vessel herself to forfeiture.

The statute was very explicit on that point. After making it unlawful to cause or permit the prohibited destruction or injury or to permit the prohibited use, the statute added that

> "in case such vessels shall be so used, * * * the vessel * * * shall be subject to seizure and forfeiture to the United States * * *."

That *actual use* of the vessel in the manner prohibited by the statute was the only forfeitable offence defined by the statute. And that offence, the libel did not charge.

The Circuit Court of Appeals, nevertheless, construed the libel as charging a forfeitable offense. It said (R.):

> "The libels are in the words of the applicable statute and clearly allege that the owner, master or other person in charge or command of the vessel *wilfully caused or permitted the destruction of the vessel and knowingly permitted the vessel to be used as a place of resort* for persons conspiring or preparing to commit offenses against the United States. This sufficiently pleads a cause of forfeiture. *The Samuel,* 1 Wheat. 9." (Emphasis supplied.)

If to cause or permit the vessel's destruction or injury or to permit her to be used in a certain manner necessarily imports her actual use in that manner, the Court was right; not otherwise. For, as this Court said in *The Samuel, supra* (15), the offense, to be properly described in the libel, must

> "be described in the words of the law, and be so described, that if the allegation be true, the case must be within the statute."

And it seems too plain for argument that if the allegation that the owner, officers and crew

> "wilfully caused or permitted the destruction of the vessel and knowingly permitted her to be used as a place of resort for persons, conspiring to commit offenses against the United States"

should be true, it would still be far from stating a "case that must be within the statute." For destruction and injury are in no event such *use* as makes the vessel forfeitable under the statute; and it is not the *permission* to make such use, but such *actual* use that constitutes a case within the statute.

b

Even if the District Court did originally acquire jurisdiction over the forfeiture cause, it lost the same when libellant availed itself of the remedy of requisition and removed the "Antoinetta" from the Court's custody and control.

The Idle Foreign Vessels Act of June 6, 1941, conferred on the Government a new remedy theretofore unavailable under the municipal law or under the law of nations. The power of requisitioning neutral ships, when being proceeded against for condemnation as prize of war, had been previously exercised *in war-time;* but even then only in recognition and observance of the strict necessity of first substituting therefor in the admiralty forum their appraised value in cash or a stipulation therefor (*The Memphis* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 202, 203-204, 16 Fed. Cas. 1340, 1341, Case No. 9,412; *The Ella Warley* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 204, 205-206, 8 Fed. Cas. 504, Case No. 4,370; *The Stephen Hart* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 387, 391, 392, 22 Fed. Cas. 1253, 1255, 1256, Case No. 13,364, aff'd 3 Wall. 559; *The Peterhoff* (D.C. S.D. N.Y.), Blatchf. Pr. Cas. 463, 550, 19 Fed. Cas. 316, 356, Case No. 11,024, aff'd in part and rev'd in part, 5 Wall. 28; *The Zamora,* [P. C.], [1916] 2 A.C. 77, 98-103, reversing the Admiralty Court).

Where a statute gives a new and unusual remedy and defines the terms and conditions on which the right thereto

may be enjoyed, those terms and conditions must be strictly observed (*French* v. *Edwards,* 13 Wall. 506, 511; *Campbellsville Lumber Co.* v. *Hubbert* [C.C.A. 6th Cir.], 112 Fed. 718, 724-725, aff'd 191 U. S. 70; *Andover and Medford Turnpike Corp.* v. *Gould,* 6 Mass. 40, 44; *Monk* v. *Jenkins,* 2 Hill's Eq. (S. C.) 9, 12; *Sutherland, Statutory Construction* [3rd ed., 1943, Horack], Vol. 2, pp. 216-217, sec. 2803).

The terms and conditions of the Idle Foreign Vessels Act (*supra,* 6 n.) were that the vessels taken thereunder must be foreign merchantmen; that just compensation "shall be determined and made" for their use; that at the end of such use they "shall be restored" and "in a condition at least as good as when taken less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition"; and that their use shall be governed by "a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States" and the owners.

Hence, the Executive Department of the Government, if it chose to gain possession of the "Antoinetta" by grace of the new power thus bestowed, had to acknowledge the foreign title, had to enter into a charter under that title, had to pay charter-hire to the foreign owner and had to restore the vessel to him at the conclusion of the charter or pay just compensation in lieu thereof.

It could not stipulate new terms and conditions of its own, such as making its obligation to pay dependent upon the outcome of pending litigation. It had its choice of continuing to pursue its judicial remedy on the theory the vessel already belonged to it; or of requisitioning, on the theory it didn't. The former course would involve delay and doubt; the latter afford immediate use and possession. It chose the latter. And by that choice it must

be bound. Its forfeiture cause was abandoned and necessarily abandoned, when that choice was made.

If the requisition did not in itself destroy the jurisdiction of the District Court over the forfeiture cause, the removal of the *res* pursuant to the requisition did. For the preservation of the *in rem* jurisdiction required the Court's continued custody and control of the *res*. This for two reasons, viz.: (1) The inherent nature of the *in rem* jurisdiction; (2) the positive command of Congress (Act of June 17, 1930, sec. 605, *supra*, 36 n.).

The second is too plain to require more than the reference to the statute requiring the vessel to *remain* in the Collector's possession *throughout* the forfeiture suit.

As to the first, this Court, in denouncing the idea that either one of the parties should be able to gain possession of the *res* and remove it from the admiralty court's custody without depositing security in its place, said by Marshall, C. J., in *Jennings* v. *Carson*, 4 Cranch 2, 23-24:

> "It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice, that security should be demanded of the libellant, to have it forthcoming to answer the order of the Court.
>
> "* * * and the court conceives the necessary result of proceedings *in rem* to be, that the thing in litigation must be placed in the custody of the law, and cannot be delivered to either party, but on sufficient security."

That essential characteristic of the *in rem* jurisdiction has continued to command the respect and observance of admiralty courts in this country from *Jennings* v. *Carson* until the decisions below (*The Brig Ann,* 9 Cranch 289, 290, 291; *Cooper* v. *Reynolds,* 10 Wall. 308, 317; *Miller* v. *United States,* 11 Wall. 268, 294; *The Rio Grande,* 23 Wall. 458, 463, 465; *United States* v. *Mack,* 295 U. S. 480, 484).

Below, the Circuit Court of Appeals, while professing respect for and observance of that principle, yet pursued a course of reasoning that emasculated it. For it held in effect that while the vessel, in libellant's possession, was roaming the seven seas, in ports of foreign sovereigns or in ports where martial law prevailed, the vessel was still "in the custody of the courts" (R.). And for this doctrine it cited *Ex parte Whitney Steamboat Co.,* 249 U. S. 115 and two District Court decisions, viz., *The Villarperosa* (D.C. E.D. N.Y.), 43 F. Supp. 140, and *The San Leonardo* (D.C. E.D. N.Y.), 51 F. Supp. 107.

Just consideration of the first of those three cases will show that it supports no such doctrine. The requisition of the vessel there involved was but a *pro forma* requisition "without dispossessing the marshal or his deputy" (117) and "did not *in fact* take her out of the custody of the court." She was apparently at all times within the territorial limits of the District as was disclosed in her owner's unsuccessful suit for requisition hire (*Acme Operating Corp.* v. *United States,* 74 Ct. Cl. 82, 87, 93, 95-96, 97, 98-99, 100, 105, rev'd in 288 U. S. 243). The only party attacking the jurisdiction was in default and without a "standing in court" and the only parties that did have a "standing in court" had consented to the *pro forma* requisition.

The two District Court cases, *The Villarperosa, supra* and *The San Leonardo, supra,* are not persuasive because they both rested on the same misconstruction of the holding in *Ex parte Whitney Steamboat Co., supra,* pointed out above, and upon two other cases quite as obviously not in point, viz., *The Rio Grande, supra,* and *The Little Charles,* 1 Brock. 347, 26 Fed. Cas., p. 979, Case No. 15,612: The first not in point, because a case of unlawful removal of the *res;* nor the second, because a case of the *res'* being replaced by a stipulation for value.

The Circuit Court of Appeals, in ruling that the "Antoinetta" was not removed "from the custody of the courts" was undertaking to repeal by judicial decision the Idle Foreign Vessels Act itself as amended by sec. 3(c) of the Act of March 24, 1943 (*supra,* 27 n.), which specifically provides that when a vessel, whose use and possession is requisitioned or taken under the Act of June 6, 1941 (*supra,* 6 n.),

> "is in the custody of any court, State or Federal, it shall be the duty of all agents and officers of the Court having possession, custody, or control of said vessel, forthwith upon the filing with the clerk of said court of a certified copy of the order of requisitioning or taking, and *without further order of the Court,* to comply with said requisitioning or taking and to permit the representatives of the United States Maritime Commission or the War Shipping Administration, as the case may be, *to take possession, custody, and control of said vessel.*" (Emphasis supplied.)

Surely, if words mean anything, those quoted above must mean that when a vessel in litigation is taken and used in requisition service under the Act of June 6, 1941, the courts lose every last vestige of custody and control

over her, and the Maritime Commission or the War Shipping Administration acquires it. And it was not within the province of the lower courts to disregard or deny the effect of that provision in an attempt to sustain their jurisdiction. Cf. *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 579.

While that amendment of the Idle Foreign Vessels Act had not yet been made when the "Antoinetta" was requisitioned and taken over, it nevertheless would clearly govern her status from and after the time when it did take effect, and at least remove her as of that time from any such chimerical custody and control of the courts as that which was assumed below.

But that alleged continued custody and control of the "Antoinetta" was not the only ground on which the Circuit Court of Appeals sought to sustain the District Court's jurisdiction. Another was that that Court had gained a substitute *res* for the vessel in the shape of the just compensation provided for by the statute, and claimed that as well to be within the court's custody and control. It said (R.):

> "The Act of June 6, 1941, provides that compensation for the use of requisitioned vessels shall be deposited with the Treasurer of the United States. This fund is, therefore, a substitute *res* and the courts' jurisdiction and dominion were extended to it. This is a sufficient answer to the claimants' assertion that *in rem* jurisdiction was lost by the requisitioning of the ships."

But here again the Court disregarded and denied effect to the express language of the Act of June 6, 1941. For that Act, so far from making the deposit with the Treasurer a substitute *res* to take the place of the vessel *in* the action from which she was taken, expressly provided that third-party lienors, including *attachment* lienors and holders of

stipulations for value, might proceed against the fund *not* in the action in which they had effected their attachment or procured their stipulation for value, but only in *new* actions.* See *Johnson* v. *Fleet Corp.,* 280 U. S. 320, 326.

And, as to the *owner* of any such vessel so taken from the Court where it is being proceeded against, the Act, so far from conferring jurisdiction upon the Court *in that action* to treat the fund as a substitute *res* and decree payment thereof to the owner *in that action,* specifically provides that he must commence a *new* action therefor in the Court of Claims under the Tucker Act (*supra,* 7 n.). For, in its first proviso, it commands (*supra,* 6 n.)

> "That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended."

---

* The second Proviso of that Act, as amended, reads as follows:

"*Provided further,* That such compensation hereunder, or advances on account thereof, shall be deposited with the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or *attachment lien* upon such vessel, or of any *stipulation therefor* in a court of the United States, or of any State, subsisting at the time of such requisition or taking of title or possession; the holder of any *such* claim may commence prior to June 30, 1943, or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the United States District Court from whose custody such vessel has been or may be taken or in whose territorial jurisdiction the vessel was lying at the time of requisition or taking of title or possession, a suit in admiralty according to the principles of libels *in rem* against the fund, which shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties, and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suits in Admiralty Act and service of process shall be made in the manner therein provided by service upon the United States Attorney and by mailing by registered mail to the Attorney General and the United States Maritime Commission and due notice shall under order of the court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction." (Emphasis supplied.)

And, sub-section (d) of said section 902 of the latter Act, as thus incorporated in the former, confines the owner's judicial remedy for the recovery of such compensation to a suit in the Court of Claims under the Tucker Act or (when claiming less than $10,000) to a suit in the appropriate District Court (*supra,* 7 n.).

Indeed, to remove all doubt on the point that the owner should have *no* right to proceed, even as third-party lienors have in a *new* action in admiralty against the deposit made with the Treasurer, a new paragraph was added at the end of said sub-section (d) of section 902, by sub-section (d) of section 3 of the Act of March 24, 1943, c. 26 (57 Stat. 49),*—which amended the Act of

* Section 3(d) of this Act reads as follows:

"(d) Section 902 of the Merchant Marine Act, 1936, as amended, is hereby amended by adding at the end of sub-section (d) thereof a paragraph to read as follows:

'The existence of any valid claim by way of mortgage or maritime claim or attachment lien upon such vessel shall not prevent the taking thereof pursuant to this section: Provided, however, that in the event any such claim exists the United States Maritime Commission may in its discretion deposit such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims in respect of the vessel, with the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or attachment lien upon such vessel, or of any stipulation therefor in a court of the United States, or of any state, subsisting at the time of such requisition or taking of title or possession; the holder of any such claim may commence prior to June 30, 1943, or within six months after the first such deposit with the Treasurer and publication of notice thereof in the Federal Register, whichever date is later, and maintain in the United States District Court from whose custody such vessel has been or may be taken or in whose territorial jurisdiction the vessel was lying at the time of requisitioning or taking of title or possession, a suit in admiralty according to the principles of libels *in rem* against the fund, which shall proceed and be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties, and any decree in said suit shall be paid out of the first and all subsequent deposits of compensation; and such suit shall be commenced in the manner provided by section 2 of the Suit in Admiralty Act and service of process shall be made in the manner therein provided by service upon the United States attorney and by mailing by registered mail to the Attorney General and the United States Maritime Commission and due notice shall under order of the Court be given to all interested persons, and any decree shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction.'" (Emphasis supplied.)

June 6, 1941,—expressly prohibiting the Maritime Commission from depositing with the Treasurer a greater amount of compensation than *just enough to satisfy the claims of third-party lienors.* It limited the Commission to depositing

> "such portion of the compensation hereunder, or advances on account thereof, *as may equal but not exceed* the amount of *such* claims in respect of the vessel * * *"

When, therefore, the Circuit Court of Appeals premised that there *would* at *some* time be—it did not say there *is now*—a deposit in the Treasury of the United States which it might treat as a substitute *res* in place of the vessel, and which it might in *this* action pay over to petitioner when and if he should be otherwise entitled to the return of his vessel, it was saying what under the terms of Congressional command could not possibly be true.

It was the Court, not the Congress, that was undertaking to declare the compensation earnings or proceeds a substitute for the *res* in the forfeiture action; which was wholly beyond its power not only for the reasons set out *supra,* but also for the jurisdictional impossibility of decreeing forfeiture against the proceeds of the offending thing instead of the thing itself (*The Motor Vessel, K-22845* [C.C.A. 2d Cir.], 55 F. 2d 671, 672).

The Act of June 6, 1941, as amended, professed to and did, insofar as it lawfully could, destroy the jurisdiction of the Admiralty Courts to proceed further in those *in rem* vessel cases during whose pendency the vessels were requisitioned and taken over by the Maritime Commission under the provisions of that Act.

When, therefore, libellant, availing itself of the remedy provided by that Act, requisitioned and took over from

the District Court possession, custody and control of the *res*, the *in rem* jurisdiction of that Court over the forfeiture cause necessarily came to an end.

CONCLUSION

The petition for writs of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decrees there entered reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Petitioners.

27

JUN 7 1946
CHARLES ELMORE CROPLEY
CLERK

Nos. 1172-1175

In the Supreme Court of the United States

OCTOBER TERM, 1945

GIUSEPPE BOZZO FU LORENZO, AS OWNER OF THE STEAM VESSEL "ANTOINETTA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

A. T. ROSASCO, AS OWNER OF THE STEAM VESSEL "SANTA ROSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

MARIANO MARESCA AND COMPANY, AS OWNER OF THE STEAM VESSEL "MAR GLAUCO," HER ENGINES, BOILERS, ETC, PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE STEAM VESSEL "BELVEDERE," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

INDEX

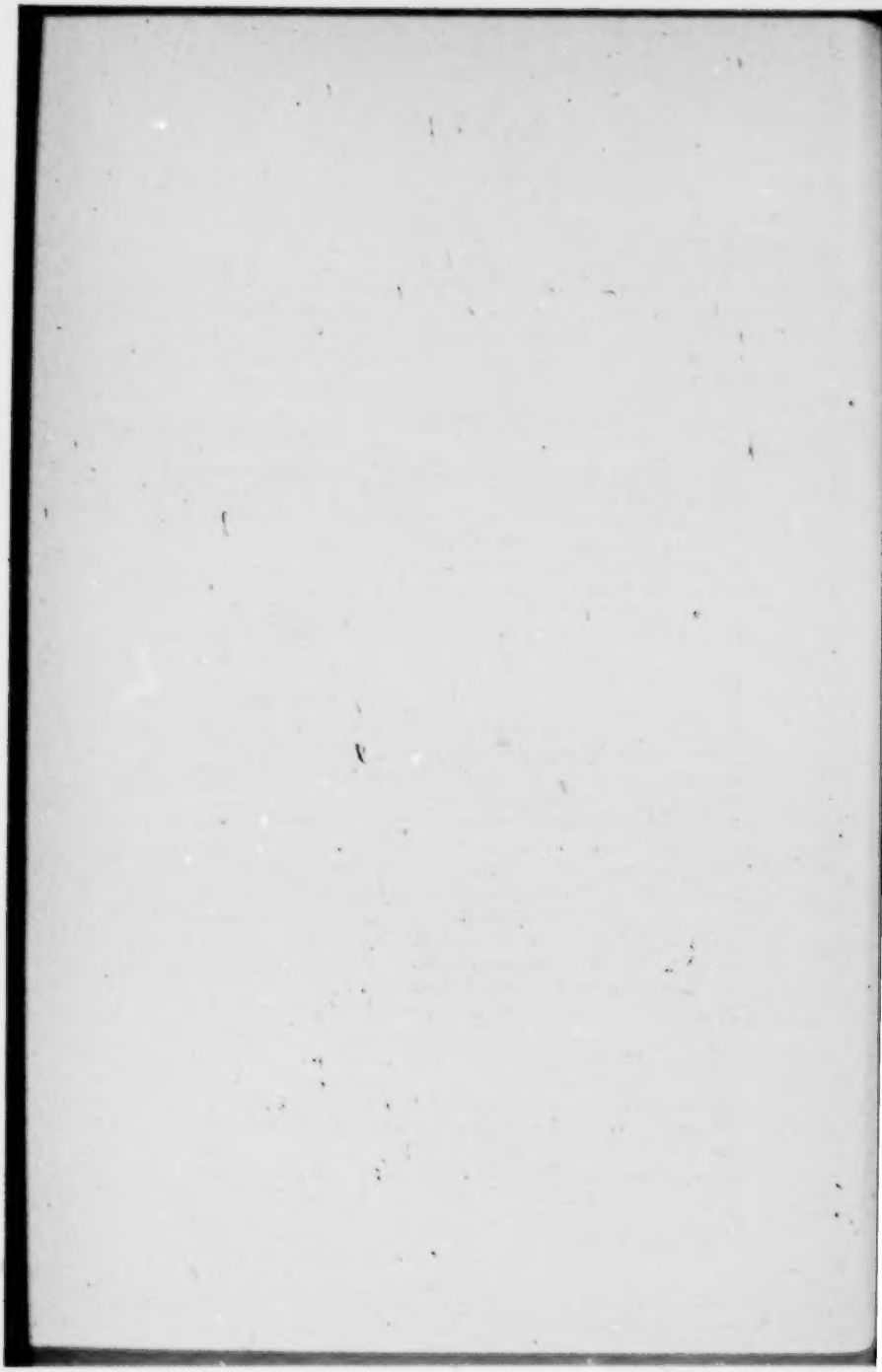
Page

Opinions below
Jurisdiction
Question presented
Statutes and Executive Orders involved
Statement
Argument
Conclusion
Appendix

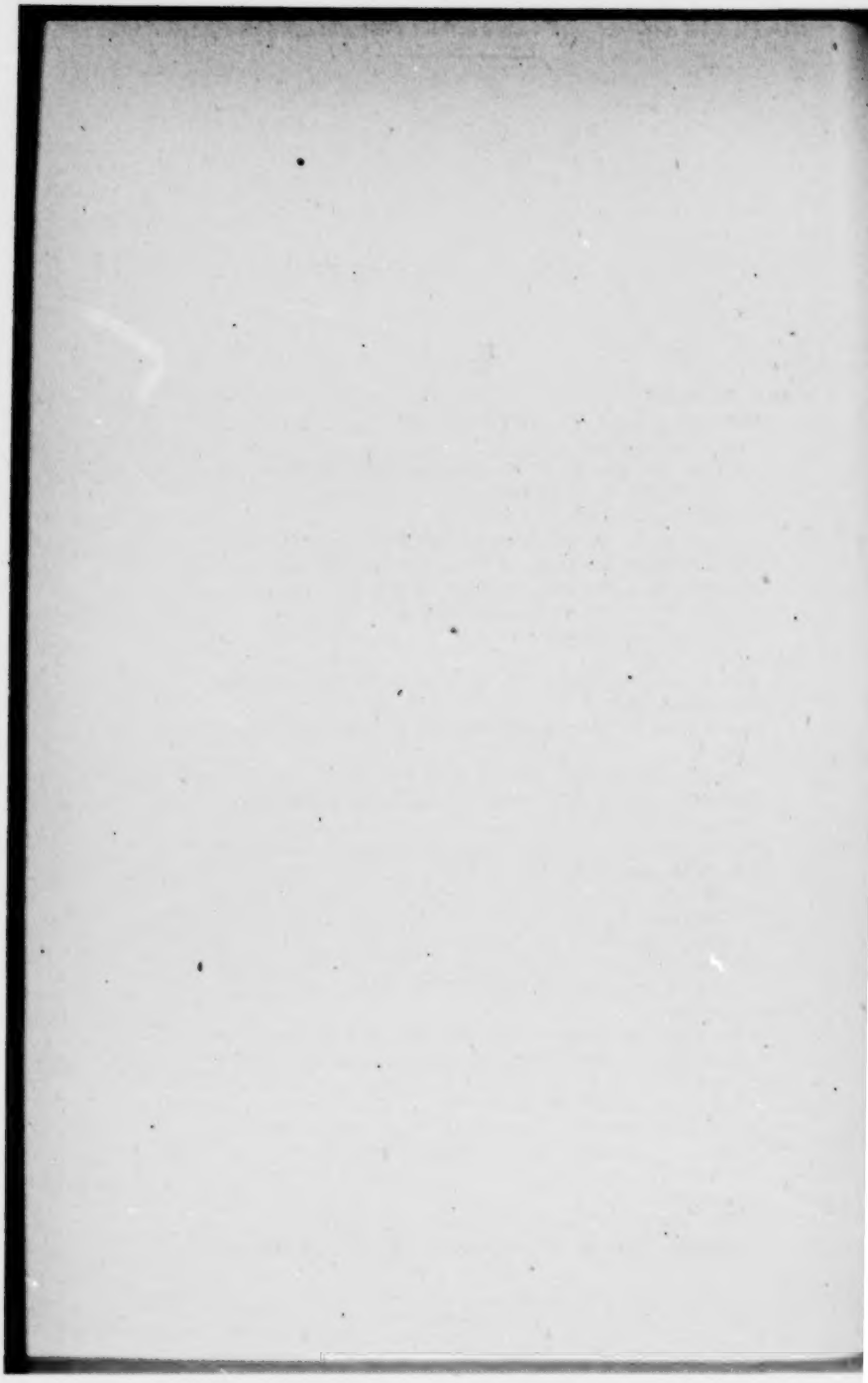
CITATIONS

Cases:

Ado O, The, E. D. La., decided February 12, 1943
Central Trust Co. v. *Garvan*, 254 U. S. 554
Citizens Protective League et al v. *Clark, Attorney General*, App. D. C., decided May 2, 1942
Clara, The, E. D. Va., decided March 5, 1943
Commercial Trust Co. v. *Miller*, 262 U. S. 51
Confidenza, The, S. D. Fla., decided January 5, 1943
Conte Biancamono, The D. C. Z., decided September 30, 1943
Cummings v. *Deutsche Bank*, 300 U. S. 115
Deutsch-Sustralische Sc v. *United States*, 59 Ct. Cls. 450
Farbwerke v. *Chemical Foundation*, 283 U. S. 152
Giuan, The, E. D. Va., decided March 5, 1943
Guidonia, The, E. D. Va., decided March 5, 1943
Hirabayashi v. *United States*, 320 U. S. 81
Home Bldg. & L. Assn. v. *Blaisdell*, 290 U. S. 398
Horowitz v. *United States*, 267 U. S. 458
Ida Z. O., The, S. D. Ala., decided November 13, 1942
Ircania, The, S. D. Fla., decided January 5, 1943
Kahn v. *Garvan*, 263 Fed. 909
Laconia, The, E. D. Va., decided March 5, 1943
Leme, The, D. Ore., decided November 8, 1943
Lynch v. *United States*, 292 U. S. 571
Markham v. *Allen*, No. 60, this Term, decided January 7, 1946
Miller, Application of, 288 Fed. 760
Miller, In re, 281 Fed. 764
Monfiore, The, E. D. La., decided February 12, 1943
Mongioia, The, S. D. Tex., decided February 20, 1943
Perry v. *United States*, 294 U. S. 330
Pietro Campanella, The, 41 F. Supp. 657



Cases—Continued
Pietro Campanella, The, 47 F. Supp. 374
Prize Cases, 2 Black 635
San Guiseppe, The, E. D. Va., decided March 5, 1943
Sonora, The, 50 F. Supp. 687
Stoehr v. *Wallace*, 255 U. S. 239
United States v. *Chemical Foundation*, 272 U. S. 1
United States v. *422 Casks of Wine*, 1 Pet. 547
United States v. *The San Leonardo*, 51 F. Supp. 107
Villorin, The, E. D. Va., decided March 5, 1943
Ware v. *Hylton*, 3 Dall. 199
Statutes:
Act of June 15, 1917, Title II, Sec. 3, 40 Stat. 220, as amended, 50 U. S. C. 193
Act of June 6, 1941, 55 Stat. 242, 50 U. S. C. App. Supp. IV, 1271
First War Powers Act, 1941, 55 Stat. 838
Merchant Marine Act, 1936, 49 Stat. 2015, as amended, 46 U. S. C. 1242
Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. Supp. IV, 1–31
Sec. 2
Sec. 4
Sec. 5 (b)
Sec. 7 (c)
Sec. 9 (a)
Executive Orders:
Exec. Ord. No. 8389 of April 10, 1940, 5 F. R. 1400, as amended by Exec. Ord. No. 8785 of June 14, 1941, 6 F. R. 2897
Exec. Ord. No. 8771 of June 6, 1941, 6 F. R. 2759
Exec. Ord. No. 9095 of March 11, 1942, 7 F. R. 1971, as amended by Exec. Ord. No. 9193 of July 6, 1942, 7 F. R. 5205
Miscellaneous:
2 Von Martens, *Precis du Droit des Gens* (1831)
Lawrence, *Principles of International Law* (7th Ed. 1910)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1172

GIUSEPPE BOZZO FU LORENZO, AS OWNER OF THE STEAM VESSEL "ANTOINETTA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

No. 1173

A. T. ROSASCO, AS OWNER OF THE STEAM VESSEL "SANTA ROSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

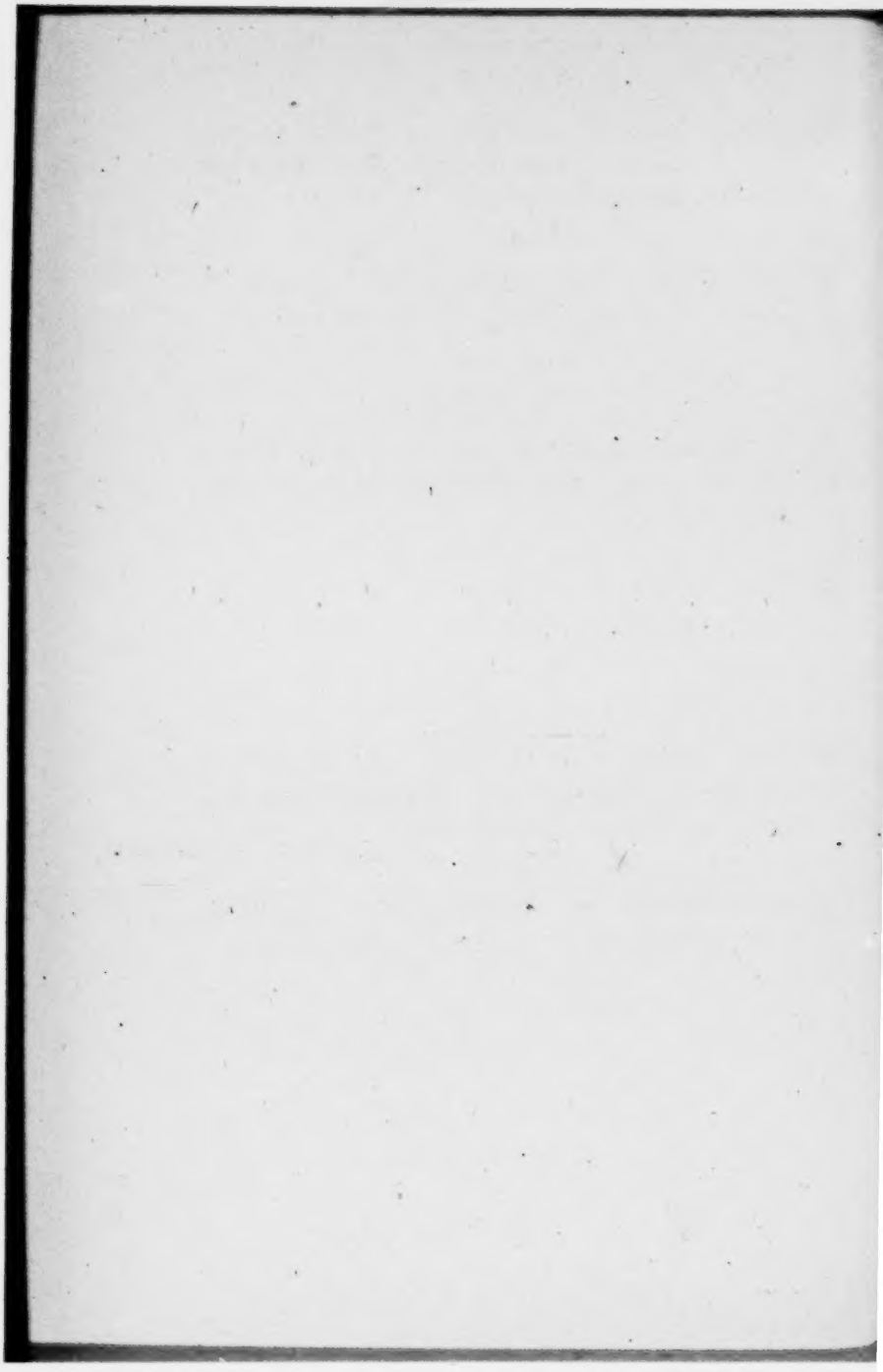
UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

No. 1174

MARIANO MARESCA AND COMPANY, AS OWNER OF THE STEAM VESSEL "MAR GLAUCO," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.



No. 1175

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE STEAM VESSEL "BELVIDERE," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA AND JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN, ETC.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

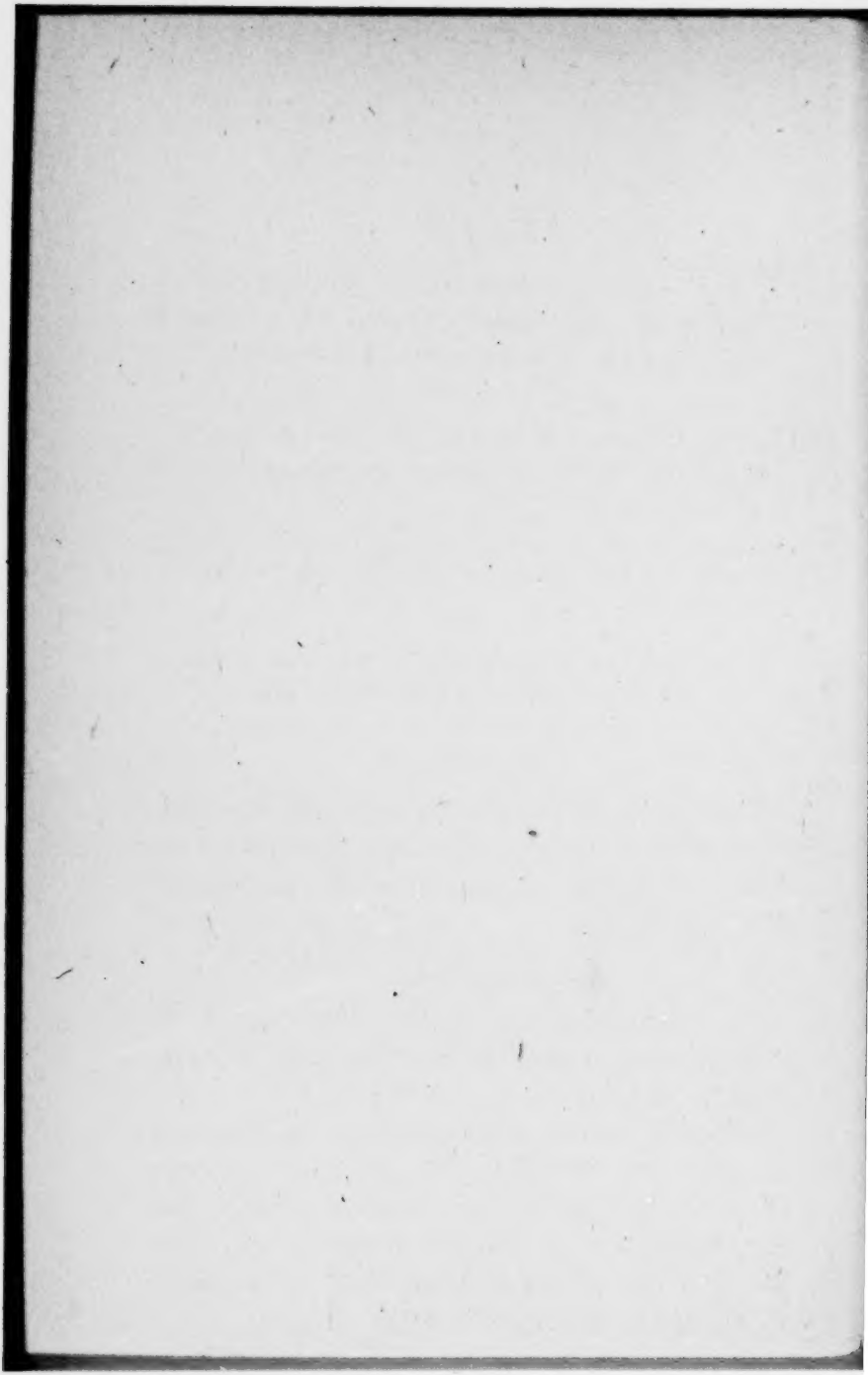
BRIEF FOR THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 46a–57a) is reported at 49 F. Supp. 148. The opinion of the circuit court of appeals (R. 85–93) is reported at 153 F. 2d 138.

JURISDICTION

The four judgments of the circuit court of appeals were entered on December 21, 1945 (R. 94–97). A petition for rehearing (R. 107–135) was denied by four orders entered on February 13, 1946 (R. 136–137). The petition for writs of certiorari was filed on April 30, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.



QUESTION PRESENTED

Whether, in a proceeding brought by the United States under the Act of June 15, 1917, for the forfeiture of certain vessels, the district court properly substituted the Alien Property Custodian for the enemy claimant of the vessels, following the Custodian's order under the Trading with the Enemy Act vesting in himself all the "right, title, and interest, if any," of the claimant in such vessels.

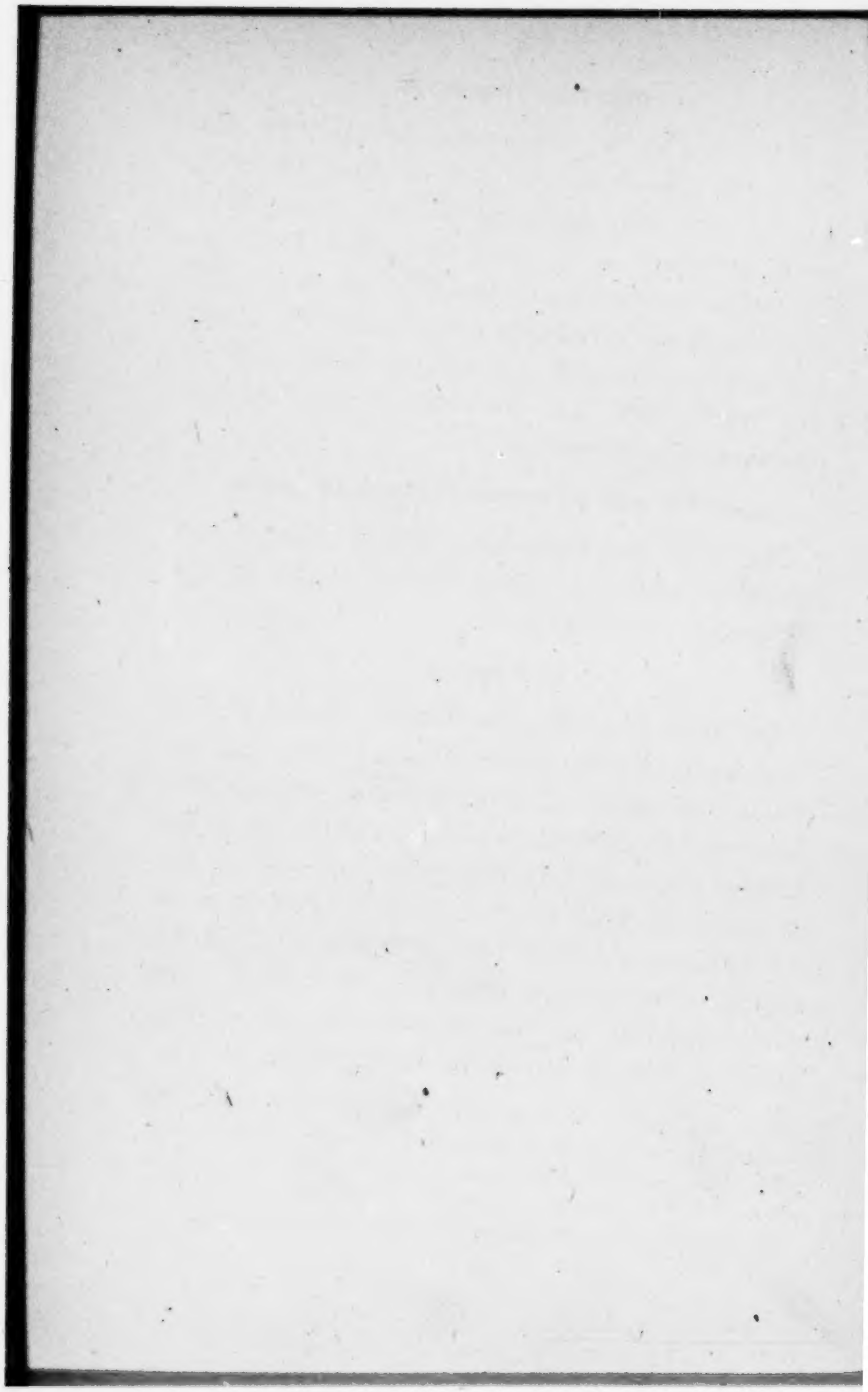
STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the statutes and executive orders involved are set forth in the Appendix, *infra*, pp. ——.

STATEMENT

On July 14, 1941, the United States filed a libel in the United States District Court for the Eastern District of Pennsylvania, seeking forfeiture of the vessel *Antoinetta*, together with her tackle, apparel, furniture, and equipment, for violation of Title II, Sec. 3 of the Act of June 15, 1917, as amended (40 Stat. 220, 50 U. S. C. 193; Appendix, *infra*, pp. ——) (R. 4a–6a).[1] The libel, couched in the language of the statute, alleged that on March 30, 1941, while the *An-*

[1] Three additional libels were filed for forfeiture of the vessels *Santa Rosa*, *Mar Glanco*, and *Belvedere*, respectively. The four proceedings were substantially identical, and this brief follows the practice of petitioner and both courts below by referring only to the facts relating to the *Antoinetta*.

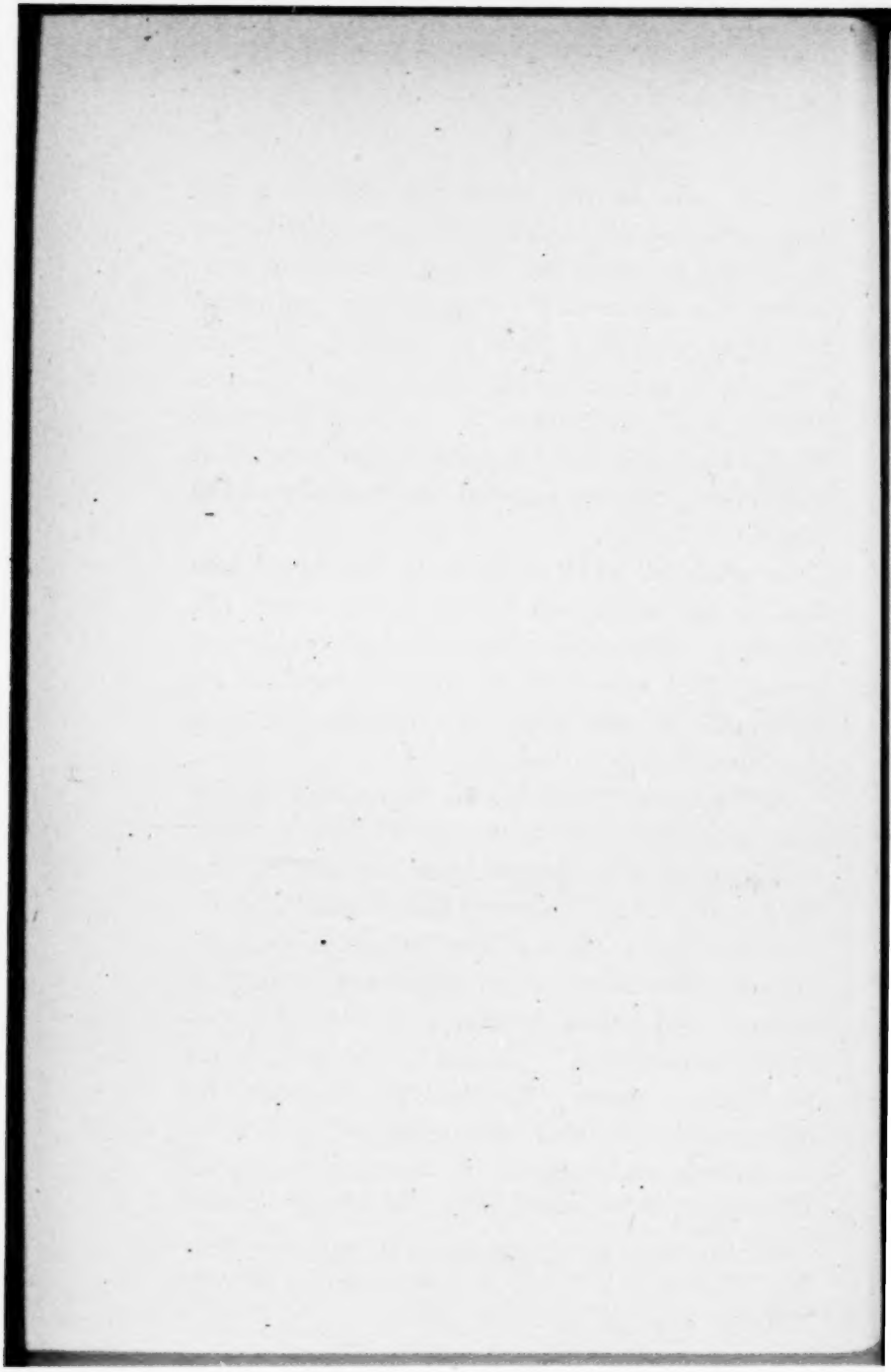


toinetta was in the territorial waters of the United States, her owner, master, or other person in charge or command willfully caused or permitted her destruction and knowingly permitted her to be used as a place or resort for persons conspiring or preparing to commit offenses against the United States (R. 4a–5a). Pursuant to the libel, the district court issued a writ of attachment, and the marshal took custody of the vessel (R. 7a–9a).

On July 31, 1941, a claim to the vessel was filed by her master on behalf of the owner (R. 11a–12a). Thereafter, the claimant (petitioner herein) filed exceptions to the libel, seeking its dismissal (R. 13a–17a). No hearing on these exceptions has been had.

On September 26, 1941, the Maritime Commission, acting pursuant to the Act of June 6, 1941,[2] requisitioned the use of the *Antoinetta,* the "Notice of Taking" reciting that it was "without prejudice to the rights of the United States under any executive seizure of, or forfeiture proceedings against, said vessel, heretofor or hereafter executed or instituted" (R. 23a). On petition of the United States (R. 18a–20a, 22a–23a), the district court directed compliance with the Notice of Taking, and ordered the marshal to appoint the master of the vessel as special deputy marshal

[2] 55 Stat. 242, 50 U. S. C. App. Supp. IV 1271; Exec. Order No. 8771, June 6, 1941, 6 F. R. 2759; Appendix, *infra*, pp. ——.



to turn over the vessel to the Maritime Commission for the purpose of the requisition, but to retain custody on behalf of the court. The court's order stated that it was "without prejudice to the continued custody of this Court over said vessel or to the rights of any of the parties * * * in the pending proceeding, or under said Act of June 6, 1941, the Court at all times retaining the custody and jurisdiction of said vessel in each of said proceedings" (R. 21a).

On July 22, 1942, the Alien Property Custodian, by Vesting Order No. 52, declared vested in the custodian, "all right, title and interest, if any," of the claimant in the Antoinetta, "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States (R. 28a.)[3] The Order included a finding that the claimant was an enemy (as defined in Section 2 of the Trading with the Enemy Act), not holding a license under the Act, and that the claimant's right, title, and interest, if any, in the vessel was the property of a national of a foreign country designated in Executive Order No. 8389, as amended, as defined therein (R. 28a). The Order stated that it should not "be construed as impairing such rights as the United States may already have in respect

[3] The Vesting Order was issued under the Trading with the Enemy Act, as amended—particularly Secs. 7 (c) and 5 (b) thereof (40 Stat. 411, 50 U. S. C. App. 1–31), and Exec. Order No. 9095 of March 11, 1942, 7 F. R. 1971.

of said [vessel] including specifically but not exclusively rights of forfeiture and salvage rights, whether or not already established by adjudication" (R. 29a–30a). The order expressed its "intention" to "effect a complete substitution" of the Custodian for the claimant, "in respect of any right, title or interest" the claimant might have in the vessel (R. 29a–30a).

On July 29, 1942, the Custodian petitioned the district court to substitute him for the claimant, and to adjudge that such right, title and interest, if any, as the claimant may have had in the vessel prior to the Vesting Order, had been vested in the *Custodian* (R. 24a, 26a). The claimant answered, admitting that he was an enemy and a foreign national (R. 41a), and moved for an order dismissing both the Custodian's petition and the libel (R. 44a–45a). The district court granted the Custodian's petition, holding that the Vesting Order had completely transferred to the Custodian the claimant's interest, if any, in the vessel, and that since the claimant's right to defend the libel could "only rest upon his claim to the libeled property", "the substitution of the Custodian was an inevitable" sequel (R. 46a, 49a, 58a). On appeal the court below affirmed, holding that the Vesting Order had divested claimant of whatever rights he may have had in the vessel, and that the Custodian had been properly substituted for him. The court below

also sustained the sufficiency of the libel, held that the district court had not lost jurisdiction by complying with the requisition, and ruled that despite the substitution of the Custodian for the claimant, a justiciable controversy remained.

ARGUMENT

The petition and supporting brief, aggregating some 126 pages, present only a single substantial question: whether the Alien Property Custodian, upon vesting all the "right, title, and interest, if any" of petitioner in a vessel which was the subject of a pending forfeiture proceeding, became entitled to be substituted for petitioner, as claimant. This question, which is not one of general importance, was answered in the affirmative by the court below, and its decision in this regard was clearly correct.[4]

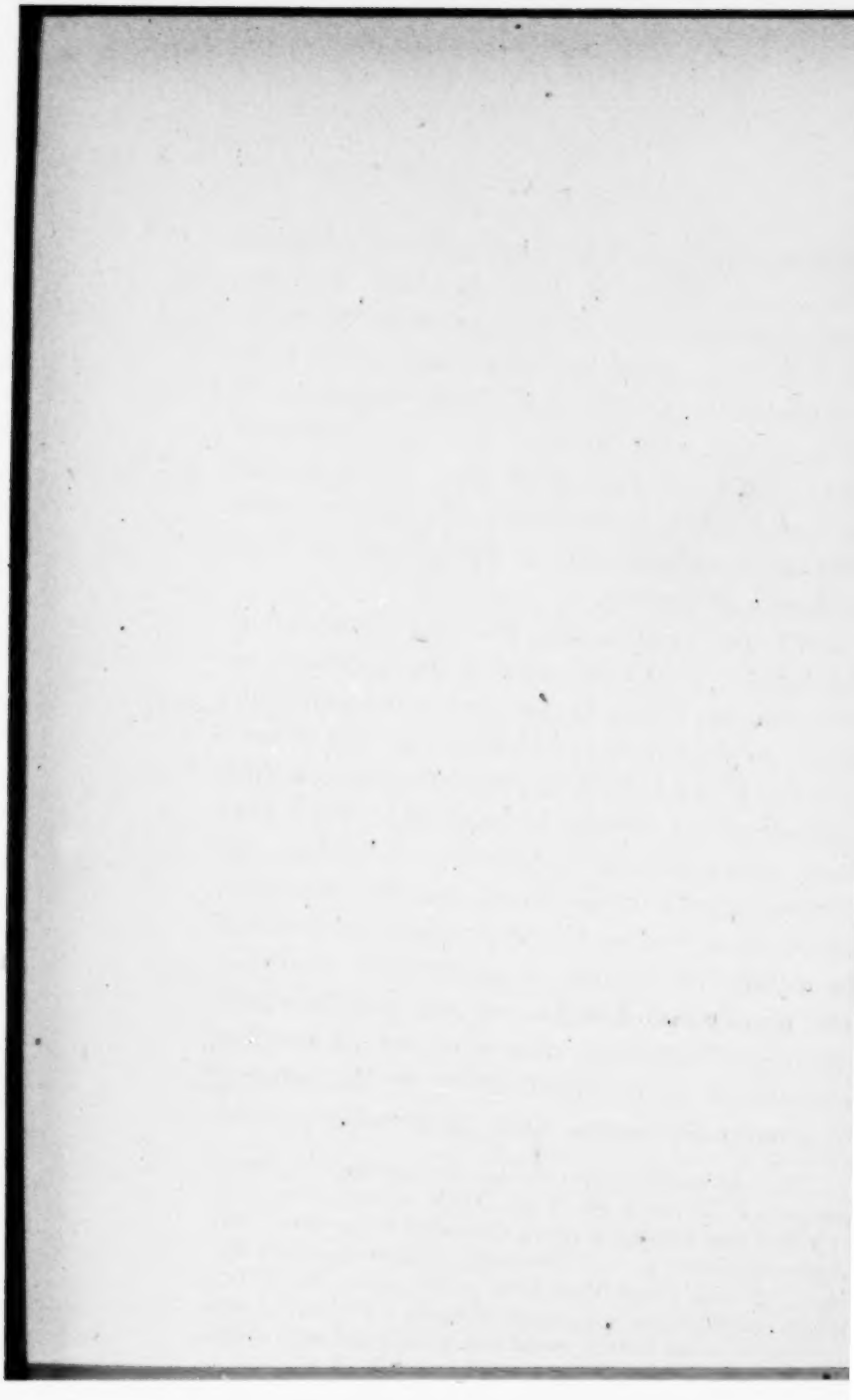
1. By the issuance of the Vesting Order, whose validity petitioner, as an enemy national (R. 41a), is without standing to challenge (*Central Trust Company* v. *Garvin*, 254 U. S. 554; *Stochr* v.

[4] Apart from the substitution of the Custodian for petitioner, petitioner questions the correctness of the decision below with respect to (1) the sufficiency of the libel, (2) the effect upon the district court's jurisdiction of its own order directing compliance with the requisition, and (3) the existence of a case or controversy following the substitution of the Custodian for petitioner. If, as we contend, the Custodian was properly substituted for petitioner, petitioner no longer has any legal interest in the forfeiture proceeding and therefore has no standing to raise any of these questions.

Wallace, 255 U. S. 239; *Farbwerke* v. *Chemical Foundation*, 283 U. S. 152, 161–162),[5] the Custodian succeeded "to all the rights in the property * * * as if by conveyance, transfer, or assignment." *Commercial Trust Company* v. *Miller*, 262 U. S. 51, 56; see *Cummings* v. *Deutsche Bank*, 300 U. S. 115. Thereafter petitioner had no interest left in the vessel, he had therefore nothing to defend, and he had hence no right to remain as a party.

Petitioner argues (Br. 103–108) that even if the Vesting Order terminated his property interest in the vessel, he retained a defensible interest in forfeiture proceeding, on the theory that (1) if the forfeiture proceeding were to fail, grounds might thereby be established for a personal action against the Collector of Customs for tortious seizure of the vessel, and (2) the vessel, by becoming vested property, would be available to satisfy the claims of petitioner's creditors. But plainly such benefits are only possible consequences of litigation over property of another, and cannot confer upon petitioner the standing of a party defendant. Only by virtue of a "pro-

[5] The only remedy which the Act confers upon the former owner is a suit under Sec. 9 (a) for the return of the property, but that remedy is expressly denied to an enemy (See Appendix, *infra*, p. —). Similarly, while a nonenemy foreign national, disqualified from relief under Sec. 9 (a), might be entitled to just compensation in a Tucker Act suit, petitioner, as an enemy, could not qualify for such relief. *Deutsch-Australische &c.* v. *United States*, 59 Ct. Cls. 450.



prietary interest in the thing in controversy" could petitioner have any standing to continue as a party. *United States* v. *422 Casks of Wine*, 1 Pet. 547, 549–550.

2. As we have already noted, petitioner's lack of standing to challenge the validity of the Vesting Order, quickly disposes of his claim that the decision below was erroneous. However, even if petitioner had the requisite standing, he could not show the Vesting Order to be invalid; the numerous attacks which he makes upon the Order are all without merit.

a. Petitioner contends (Br. 100–102) that the Custodian's vesting power is conditioned upon a preliminary finding by the Custodian that there is a *presently existing* interest owned by an enemy—a determination not made in the Vesting Order here involved. But nothing in the Trading with the Enemy Act forbids the vesting of contingent or undetermined interests; and, there is an abundance of authority in the Act, and executive orders issued thereunder, for the vesting of such interests.[6] The capture of these interests

[6] Sec. 5 (b) of the Act authorizes the vesting of "any property or interest of any foreign country or national thereof" and authorizes the President to prescribe definitions of any or all of the terms used in the subdivision (Appendix, *infra*, p. —). The President has authorized the Custodian to vest various species of property, including "any ship or vessel or interest therein, in which any foreign country or national thereof has an interest"; the Custodian's authority also comprehends "any property of any nature whatso-

plainly serves one of the purposes of the Act—the lessening of the enemy's ability to derive any advantage, by sale or otherwise, from property interests, whether actual or merely asserted, in the United States. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9–10. The Custodian's method of taking these interests—the "right, title and interest" Vesting Order here employed—has been approved both during the last war (*Application of Miller*, 288 Fed. 760 (C. C. A. 2); *In re Miller*, 281 Fed. 764 (C. C. A. 2); *Kahn* v. *Garvan*, 263 Fed. 909 (S. D. N. Y.)) and during this war (*Markham* v. *Allen*, No. 60, this Term, decided January 7, 1946.)[7]

---

ever * * * which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to or claimed by a designated enemy country or national thereof" (Secs. 2 (e) and (f) of Exec. Ord. No. 9095 of March 11, 1942, as amended by Exec. Ord. No. 9193 of July 6, 1942; Appendix, *infra*, pp. ——). Similarly, Sec. 7 (c) of the Act authorizes the Custodian to demand and seize "any * * * property including * * * choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy" (Appendix, *infra*, p. —).

[7] The express terms of the Vesting Order here involved dispose of the petitioner's point (Br. 64–65), apparently not seriously pressed, that the United States sought inconsistent remedies against the vessel—that it may not simultaneously seek forfeiture under the Act of June 15, 1917, and capture under the Trading with the Enemy Act. But the Vesting Order, by its very terms, only took such interest as the petitioner might have, *i. e.*, such interest as might survive the forfeiture proceeding. The Order neither affirmed nor de-

b. Petitioner also contends (Br. 83) that the Vesting Order "was not within the purpose" of the Trading with the Enemy Act, because the Order allegedly failed to "cripple the enemy's power of waging war." But as noted above, the vesting of contingent or undetermined interests effectuates one of the purposes of the Act by preventing the enemy from bettering himself through the sale of such interests. In any event, the Custodian's decision to issue the Order was a discretionary determination of the occasion for the exercise of a war power, and is not reviewable. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *The Prize Cases*, 2 Black 635, 670; *Citizens Protective League et al.* v. *Clark, Attorney General*, Nos. 9193–9195, (App. D. C.), decided May 2, 1942, slip sheet opinion, p. 5.

c. Petitioner next argues (Br. 66–70) that the requisition gave his interest the character of sovereign property of the United States, thus rendering it immune from vesting.[8] The requi-

---

nied the petitioner's title, but merely recognized the fact of the forfeiture proceeding and did not attempt to prejudge its outcome. There was thus no inconsistency between the forfeiture and the Vesting Order.

[8] Alternatively, petitioner advances the contention (Br. 71–83) that the requisition gave him an irrevocable license, within the meaning of Section 7 (c) of the Trading with the Enemy Act (Appendix, *infra*, p. —), to continue to hold his property as against the Custodian. Moreover, on petitioner's hypothesis, this "license" must have been granted by the Maritime Commission and not by the Custodian; it must have been granted pursuant to a requisition statute and not the

sition order, however, expressly disclaimed giving petitioner's interest a special character, for it stated that "such taking is without prejudice to the rights of the United States under any executive seizure of, or forfeiture proceedings against, said vessel, heretofore or hereafter effected or instituted" (R. 23a). The order went so far and only so far as to take the possession and use of the vessel, and to state that just compensation would be afforded to the true owners, whoever they might be. *The Sonora*, 50 F. Supp. 687 (S. D. Tex.); *The Pietro Campanella*, 41 F. Supp. 657, 658–659 (D. Md.).

d. Petitioner also argues (Br. 84–90) that the Vesting Order attempted to repudiate a contractual obligation, created by the requisition, to restore the vessel and pay for its use, and therefore violated the constitutional command that the "validity of the public debt of the United States * * * shall not be questioned" (Fourteenth Amendment, Sec. 4). The short answer

---

Trading with the Enemy Act: and it must be deduced from a document—the order of requisition—which does not mention the petitioner or his interest in the vessel, and expressly disavows any intention to prejudice executive seizures of the vessel. Indeed, when the requisition was made, on September 26, 1941, the United States was not at war, and in consequence there was no enemy property which could be seized. Additionally, Section 4 of the Trading with the Enemy Act (Appendix, *infra*, p. —) expressly makes licenses revocable, so that the Vesting Order clearly revoked whatever license was then outstanding.

to this contention is that the obligation was not repudiated, but was simply conveyed to the Custodian by the Vesting Order. *Commercial Trust Co.* v. *Miller*, 262 U. S. 51; *Central Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Farbwerke* v. *Chemical Foundation*, 283, U. S. 152. On petitioner's theory, enemy-owned Government bonds and, indeed, enemy-owned cash in the form of obligations of the United States Treasury, would be immune from vesting.[9]

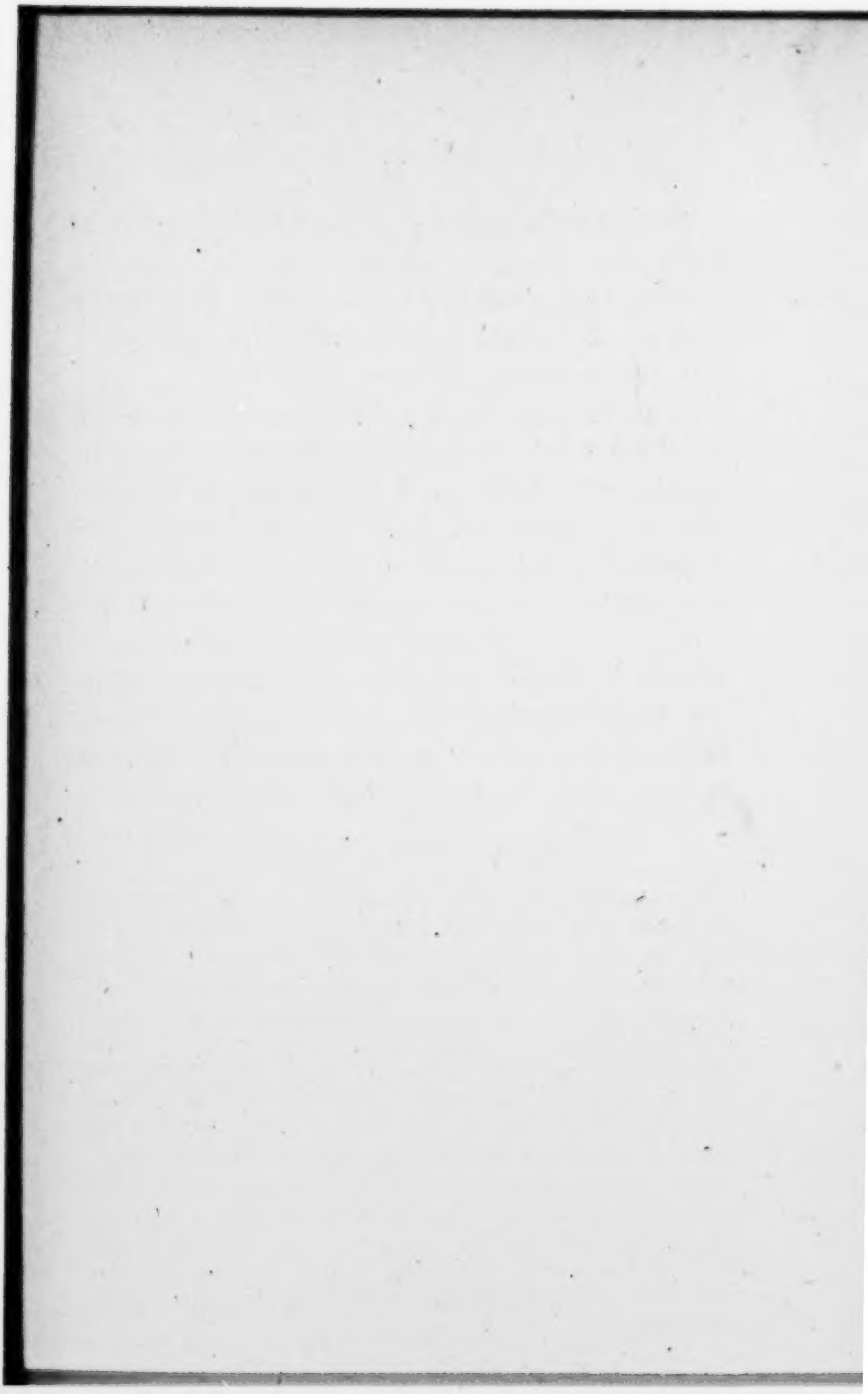
c. Finally, petitioner cites a rule of international law forbidding the repudiation of a public debt in the hands of the enemy (Br. 90–99). Even if this rule was ever more than a principle of expediency designed to preserve the credit of the state and applicable only to formal loans, as to which see 2 Von Martens, *Precis du Droit des Gens* (1831), p. 193; Lawrence, *Principles of International Law* (7th Ed. 1910) p. 406, it is plainly inapplicable in the presence of such contrary domestic legislation as the Trading with the Enemy Act. See *Ware* v. *Hylton*, 3 Dall. 199, 229.

[9] In any event, the Government's promise to pay just compensation may not be read as a promise to pay plus a guarantee against the use of all other sovereign powers which might operate to prevent payment. A contract with the sovereign is not, unless expressly stated, to be construed as a renunciation of the sovereign's other powers. *Horowitz* v. *United States*, 267 U. S. 458. See *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 435.

From the foregoing, it is clear that, apart from petitioner's lack of standing to challenge the Vesting Order, the Order was valid in all respects, and vested in the Custodian whatever interest, if any, that petitioner still had in the vessel.

3. In holding that the Custodian was properly substituted for petitioner, the decision below is in conflict with decisions of district courts in other circuits.[10] However, there are no factors here presented which would warrant departure from the general rule that a conflict between the decision of a circuit court of appeals and the decisions of district courts is an insufficient reason for review on certiorari. In one case, *The Leme*, the forfeiture proceeding in the District of Oregon is going forward; in the others, hearing has been

[10] *E. G., The Pietro Campanella*, 47 F. Supp. 374 (D. Md.; stay *pendente bello* granted); *The Ida Z. O.*, (D. Ala., decided November 13, 1942, without opinion; stay *pendente bello* granted); *The Clara, The Giuan, The Guidonia, The Laconia, The San Giuseppe* and *The Vittorio*, (D. Va., decided March 5, 1943, without opinion; stay *pendente bello* granted); *United States* v. *The San Leonardo*, 51 F. Supp. 107 (D. N. Y.); *The Confidenza* and *The Ircania*, (D. Fla., decided January 5, 1943, without opinion); *The Ada Ox* and *The Monfiore*, (D. La., decided February 12, 1943, without opinion); *The Mongioia*, (D. Tex., decided February 20, 1943, unreported, Custodian permitted to intervene; other relief denied); *The Leme*, (D. Ore., decided November 8, 1944, without opinion; Custodian permitted to intervene; other relief denied); *The Conte Biancamano*, (D. C. Z., decided September 20, 1943, without opinion; Custodian permitted to intervene; other relief denied; stay granted *pendente bello*).



postponed or stayed by order of the court. In all the cases, the Custodian is a party and may protect his rights under the Vesting Order. There is no reason to believe that the district courts involved (or the appropriate circuit courts of appeals if appeal ultimately becomes necessary) will decline to follow the well reasoned and clearly correct decision of the court below.

CONCLUSION

The decision below is correct, the question is not one which warrants further review, and there is no conflict with any other circuit court of appeals. The petition for writs of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
JOSEPH B. GOLDMAN,
DAVID SCHWARTZ,
DAVID E. FELLER,
Attorneys.

RAOUL BERGER,
General Counsel to the Alien Property Custodian,
Of Counsel.

697178—46——2

APPENDIX

STATUTES

1. Title II, Sec. 3, of the Act of June 15, 1917 (40 Stat. 220, as amended, 50 U. S. C. 193) provides as follows:

> SEC. 3. *Destruction of, injury to, or improper use of vessels.*—It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place or resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessels shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and whoever violates this section shall be fined not more than $10,000 or imprisoned not more than two years or both.

2. Sec. 1 of the Act of June 6, 1941 (55 Stat. 242, as amended, 50 U. S. C. App. 1271) provides in part as follows:

> *Purchase, requisition, etc. of foreign vessels, authorized during national emergency; compensation; claims against vessels.*— Whereas Congress has power to provide for the common defense and general welfare and to regulate commerce with foreign nations and whereas for this purpose embargo Acts and nonintercourse Acts have from time to time been passed and whereas the commerce of the United States is at the present time interrupted and the general welfare of its citizens is threatened and an emergency has been declared, for the purposes of national defense, during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended: *Provided further*, That, such compensation hereunder, or advances on account thereof, shall be deposited with

the Treasurer of the United States, and the fund so deposited shall be available for the payment of such compensation, and shall be subject to be applied to the payment of the amount of any valid claim by way of mortgage or maritime lien or attachment lien upon such vessel, or of any stipulation therefor in a court of the United States, or of any State, subsisting at the time of such requisition or taking of title or possession;
* * *

3. The Trading with the Enemy Act (c. 106, 40 Stat. 411, as amended, 50 U. S. C. App., Supp. IV, 1–31, provides in part as follows:

SEC. 4—(a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States through an agency or branch office, or otherwise, may within thirty days after the passage of this Act, apply to the President for a license to continue to do business; and, within thirty days after such application, the President may enter an order either granting or refusing to grant such license. The license, if granted, may be temporary or otherwise, and for such period of time, and may contain such provisions and conditions regulating the business, agencies, managers and trustees and the control and disposition of the funds of the company, or of such enemy or ally of enemy, as the President shall deem necessary for the safety of the United States; and any license granted hereunder may be revoked or regranted or renewed in such manner and at such times as the President shall determine: *Provided, however,* That reasonable notice of his intent to refuse to

grant a license or to revoke a license granted to any reinsurance company shall be given by him to all insurance companies incorporated within the United States and known to the President to be doing business with such reinsurance company: *Provided further*, That no insurance company, organized within the United States, shall be obligated to continue any existing contract, entered into prior to the beginning of the war, with any enemy or ally of enemy insurance or reinsurance company, but any such company may abrogate and cancel any such contract by serving thirty days' notice in writing upon the President of its election to abrogate such contract.

* * * * *

SEC. 5 (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate,[1] or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

[1] By Paragraphs 6 and 12 of Exec. Ord. No. 9095 of March 11, 1942, 7 F. R. 1971, as amended by Exec. Ord. No. 9193 of July 6, 1942 (see pp. ——, *infra*) the President delegated to the Alien Property Custodian, with certain exceptions not relevant here, all the authority conferred by Section 5 (b) of the Act.

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States: and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

* * * * *

(b) (3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall

not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. * * *.

* * * * *

SEC. 7 (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.[2]

* * * * *

SEC. 9 (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other prop-

---

[2] Authority to exercise the powers conferred by Section 7 (c) was delegated to the Alien Property Custodian by a series of Executive Orders:

Exec. Ord. No. 2813, of February 26, 1918;

Exec. Ord. No. 8136, of May 15, 1939, 4 F. R. 2044;

Exec. Ord. No. 9142, of April 21, 1942, 3 C. F. R. (Cum. Supp.) 1148.

erty which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to

which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

EXECUTIVE ORDERS

1. Executive Order No. 2813, of February 26, 1918 (set out in Meares, *Trading with the Enemy Act*, p. 584):

By virtue of the authority vested in me by "an Act to define, regulate, and punish trading with the enemy, and for other purposes", approved October 6, 1917, known as the "Trading with the enemy Act," I hereby make the following orders, rules and regulations.

* * * * * *

(2) Demands Pursuant to Section 7 Subsection "c" (a) The Alien Property Custodian may make demand for the conveyance transfer, assignment, delivery, and payment of any money or other property owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy not holding a license granted by me or in the exercise of my power and authority, which the Alien Property Custodian after investigation shall determine is so owing or so belongs or is so held, together with every right, title, interest and estate of the enemy in and to such money or other property * * *.

* * * * *

2. Executive Order No. 8136 of May 15, 1939 (4 F. R. 2044):

* * * * *

1. All power and authority conferred upon the President by sections 9, 12, 20, and 21 of the said Trading with the Enemy Act, as amended, and all power and authority which the President under that Act has heretofore ordered to be exercised through the Alien Property Custodian, are hereby vested in and shall be exercised through the Attorney General or the Assistant Attorney General in charge of the Claims Division in the Department of Justice.

* * * * *

3. Executive Order No. 9095 of March 11, 1942 (7 F. R. 1971), as amended by Executive Order No. 9193 of July 6, 1942 (7 F. R. 5205):

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the Enemy Act of October 6, 1917, as amended,

and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; and

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended, including, but not limited to, the

power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order.

* * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was

within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

4. Executive Order No. 9142, of April 21, 1942 (7 F. R. 2985):

* * * * *

1. All authority, rights, privileges, powers, duties, and functions transferred or delegated to the Department of Justice, to be administered under the supervision of the Attorney General, by Executive Order No. 6694 of May 1, 1934, or vested in, transferred or delegated to, the Attorney General or the Assistant Attorney General in charge of the Claims Division of the Department of Justice, by Executive Order No. 8136 of May 15, 1939, are hereby transferred to the Alien Property Custodian provided for by Executive Order No. 9095, dated March 11, 1942.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948